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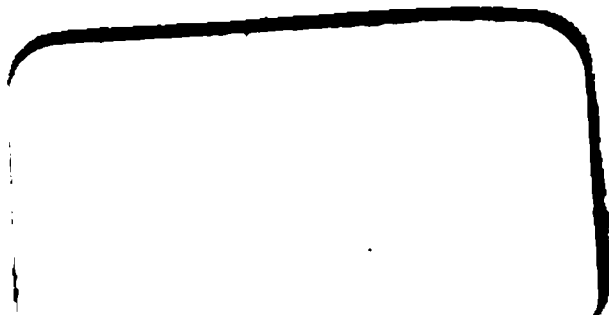
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**EASTERN
LAW REPORTER
CANADA**

CONTAINING JUDGMENTS OF THE COURTS

—OF—

NOVA SCOTIA, NEW BRUNSWICK

AND

PRINCE EDWARD ISLAND

ALSO CASES OF GENERAL INTEREST IN QUEBEC.

VOLUME II.

EDITOR:

E. B. BROWN

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NEW BRUNSWICK.

FULL COURT.

APRIL 21ST, 1906.

EX PARTE TOMPKINS.

*Intoxicating Liquors—Sale without License—Summons for
Day of Month with Inconsistent Day of Week—Date of
Alleged Offence Changed in Accused's Absence.*

Application for a rule absolute for a writ of certiorari and for a rule nisi to quash a conviction for unlawfully selling liquor without a license, argued on the 20th of April, 1906, before TUCK, C.J., HANINGTON, LANDRY, BARKER, MCLEOD, and GREGORY, JJ.

J. H. Barry, K.C., for the application.

TUCK, C.J.:—This was a complaint under the Liquor License Act, C. S. 1903, c. 22, under which Tompkins was convicted of selling without license.

Two points were taken in the case; the first was that the day upon which Tompkins was summoned to attend the Court was an impossible day. The summons called upon him to appear on Tuesday, the 8th of February, 1906, when in reality Thursday was the 8th of February. I am not sure, but my impression is that it has been decided that in a case like this the party summoned is bound to appear on the day of the month stated in the summons, disregarding the day of the week, if he has any answer to make to the charge against him. He did not appear on the 8th and the magistrate convicted him, and we think rightly.

There was one other point in the case, and that was that the defendant was charged with having sold intoxicating liquor without a license on the 24th of November, 1905, and when it came to trial he did not appear and the magistrate amended the information from a charge for selling on the 24th to a charge for selling on the 20th. The Court is of opinion that the magistrate had a right to do that, and enter a conviction for a sale on the amended information.

Ex parte Doherty, 33 N. B. R. 15, was relied upon to obtain the rule. That was a different case; there the charge was for selling, and the information was amended to a charge for keeping for sale, which was a different offence. The majority of the Court (Mr. Justice Landry and myself dissenting) held that the defendant could not be convicted on the amended charge. The present case is simply that the information was changed from selling on the 24th to selling on the 20th, and of course it was the same offence.

We think that the magistrate had the power to make the amendment, and the motion for a rule absolute for a certiorari and a rule nisi to quash is refused.

HANINGTON, LANDRY, BARKER, and GREGORY, J.J., concurred.

MCLEOD, J.:—While I do not dissent from the judgment in this case, yet upon the latter of the two grounds taken I certainly have very grave doubt.

The defendant was charged with the offence of selling liquor on the 24th of November, 1905, without the license required by law. There may have been reasons why he did not attend before the magistrate to answer the charge of selling on the 24th; and it was not necessary for him to attend. In his absence they changed the information, and charged him with selling on the 20th. He had no notice whatever that he was to be tried for an offence committed on the 20th, and it seems to me open to very grave doubt whether a man can be charged with having committed an offence, and if he does not appear in answer to the charge the information can be amended to a charge for selling on some other date, and he without having any notice whatever can be convicted on the amended charge. Expressing this doubt I will not dissent.

NOVA SCOTIA.

TOWNSHEND, J.

OCTOBER 2ND, 1906.

LOCKETT v. CRESS.

Husband and Wife—Debts of Wife before Marriage—Property of Wife received by Husband—Right to Apply on Indebtedness of Wife to Him—Necessaries Purchased by Wife after Marriage—Husband not Liable when Credit Given to Her Personally.

Trial of action.

F. L. Milner, for plaintiff.

W. E. Roscoe, K.C., for defendants.

TOWNSHEND, J.:—This is an action for goods sold and delivered and on a promissory note. The sale and delivery of the goods to defendant's wife is proved as well as her indorsement of the note which, not being paid by the maker, was charged against her. The question in controversy is whether the defendant's husband is liable for the debt incurred by his wife. The defendant, Eliza Cress, was a widow with seven comparatively young children. Some months after her husband's death the defendant, William Cress, who had been working for her husband, married her. During her widowhood a part of the indebtedness was incurred, and the remainder after marriage. The goods supplied were necessities for herself and family, but no part of them was incurred for the husband. The claim comes under two heads: (1) Those goods supplied during the wife's widowhood; and (2) those supplied after marriage. Dealing first with those supplied after marriage, I think there can be no doubt that there is a presumption in law as to necessities suitable to the condition of the parties when cohabiting that there is an implied agency to the wife, but this agency may be rebutted in many ways, one of which is to whom was the credit given? In this case I am of opinion that, under the evidence, the credit was given and the sales made to the wife only and not to the husband. It is only necessary to refer to the depositions of two witnesses produced by plaintiff to see this. Lita Brown says: "I was advised by plaintiff to whom

credit was to be given. He advised me to give credit to Mrs. Eliza Cress at the time. I have heard plaintiff say that Mrs. Cress had property and that was the reason credit was given to her. All the goods mentioned were sold to Mrs. Cress." Kenneth Covert says: "I was instructed by plaintiff as to whom credit should be given. I was instructed to charge these goods to Mrs. William Cress and not to her husband. . . . Mrs. Cress always had an account there while I was there. She had a previous account with Mr. Lockett in her previous name of Mrs. Smith Lorimore." It is further shown that these instructions were carried out and that the goods were charged to Mrs. Cress and not to her husband.

Under this evidence I can have no doubt that the defendant's wife is alone responsible for all the goods as well as the note after the marriage, and that the defendant William Cress is not liable for any of them.

As to those supplied before marriage it is sought to make the husband responsible on the ground that he received property or funds of the wife equal at least to the amount of the claim. As a fact I find that it has not been proved that he received any property or funds from her except in one particular. He admits that he cut timber on her lands to the value of at least \$50, and it is claimed that to that extent, at any rate, he is liable. It is contended on the part of the husband that before marriage the wife was indebted to him to an amount greater than what he received, and that he appropriated all he got in payment of this debt due to himself. I am satisfied from the evidence that the wife was so indebted and the only question then is, could he legally so appropriate the funds coming into his hands? It is possibly not so clear under the circumstances of the case that he was right in doing so, but, on consideration of all the facts, I am unable to discover any just reasons why he was not entitled to do so. He certainly could have sued and recovered from her the amount of her indebtedness, and I cannot see that his subsequent marriage with her precluded him from doing that which he could have done had he not married her. Had she sued him for the lumber cut on her land with her consent, I think he could have successfully set up the debt due from her as a defence. In view of the Married Women's Property Act, and the reasons I have above referred to, I am of opinion plaintiff cannot recover against the husband the indebtedness before marriage.

The plaintiff will therefore have judgment against the defendant Eliza Cress for the whole claim, and his action against the defendant William Cress will be dismissed with costs.

NEW BRUNSWICK.

FULL COURT.

APRIL 21ST, 1906.

IRVINE v. STANLEY OVERSEERS.

Poor Law—Pauper—Settlement—Medical Services Rendered by Direction of One Overseer—Overseers Liable in their Corporate Capacity.

Appeal by plaintiff from County Court of York, argued in Hilary Term, 1906, before TUCK, C.J., HANINGTON, LANDRY, BARKER, and McLEOD, JJ.

O. S. Crockett, for plaintiff.

J. H. Barry, K.C., for defendants.

BARKER, J.:—The plaintiff, the present appellant, is a physician formerly practising at Boiestown, and he seeks in this action to recover the sum of \$196 for professional services rendered to an indigent person by the name of Palmer, who was at the time he was injured a resident of the parish of Stanley. On the 23rd September, 1901, Palmer sustained very serious injuries by the accidental explosion of some dynamite caps. His left hand was torn off, his right hand broken, his right eye blinded, and he was otherwise injured. In response to a telephone message Dr. Irvine, who was then at Boiestown, immediately came to see Palmer. He amputated the left arm and did what was necessary in reference to the other injuries. Immediately after returning home on the day of the accident he telephoned to Price, one of the overseers of the poor for the parish of Stanley, and the one who dealt with matters relating to the poor arising in that district of the parish, but Price was then in the woods and not expected home for some days. When he came home he was informed of the telephone message and he then telephoned to the plaintiff, and as a consequence of that he and Price had an inter-

view soon after in reference to the matter. Price then told the plaintiff that "he had done all right, to continue treating the patient and it would be a parish charge." The doctor had up to that time been visiting Palmer daily and he continued to attend him until October 31st, in all a period of over five weeks. During that time, in consequence of gangrene setting in, he was obliged to perform a secondary amputation. He also employed and paid a trained nurse for several days' attendance and supplied all the necessary medicines and dressings. The evidence of Price, who had been one of the overseers of the poor for that parish for over five years, shows that it was the practice of the overseers to act separately in matters arising in their respective districts, and that the overseer of the poor in his district always did what was required to be done there without reference to the other overseers of the parish. He says that he understood that to be the practice, that he acted upon it and gave orders for the payment of money for poor purposes without any special authority from the other overseers, which orders had always been paid. In addition to this, Bliss, who has been treasurer of the municipality of York for many years, and who would therefore be fully conversant with the method of disposing of moneys assessed for the support of the poor, says that the practice was for the councillors to give orders for the payment of money to one overseer, and he produced two orders of the councillors of the parish of Stanley to him as treasurer for the payment of money to Price as overseer. The Judge of the County Court directed the jury that there was no evidence that Palmer was a pauper within the meaning of the Act, and that the overseers could not be bound by any engagement of the plaintiff unless they acted as a corporate body, and he accordingly ordered a verdict to be entered for the defendants. A motion for a new trial was made, but the Judge adhered to his previous expressed opinion and refused the application.

There has been a gross miscarriage of justice in this case which I hope may be rectified as soon as possible. The respondents' counsel on the argument said that there was no dispute as to the services rendered or their sufficiency, nor as to the reasonableness of the amount charged. Their defence is altogether rested on the two points mentioned by the Judge at the trial upon which he directed the verdict. I think he was wrong on both points. I cannot see what is meant by a

person being a pauper within the meaning of the Act. The Act provides no particular definition of the word "pauper," or "poor person," nor any official means of acquiring the title. It does make provision for gaining a legal settlement in a parish, but no such question arises in this case. There is no dispute here as to what parish the expense incurred is chargeable, if it is chargeable to any. At the time of this accident Palmer had been a resident of Stanley for some twenty years. Section 1 of c. 179, C. S. 1903, says: "A legal settlement in any parish of this Province shall be gained, so as to subject and oblige such parish to relieve and support the persons gaining the same, in case they become poor and stand in need of relief, by the ways and means following, etc." That is to say, every person under that Act acquires a settlement by residence or otherwise in a particular parish, so that if he becomes poor and stands in need of relief, that parish is bound to relieve and support him. There was no such Act in this Province previous to 1876 (39 V. c. 11), and it was passed for the purpose of compelling each parish to support its own poor. There never was any question about the support of the indigent poor, but questions did arise as to the particular parish which ought to pay for it, and it was to determine that question that the Act was passed. See *Gillespie v. Phillips*, 10 N. B. R. 221. There is no question made here as to the particular parish which is liable, and this chapter has little or nothing to do with the points now up for discussion. Section 1 is in effect a legislative declaration that every poor person standing in need of relief is obliged to be relieved and supported by the parish in which he has a settlement. It is a question of fact whether Palmer was poor and stood in need of relief or not. Just as it might be a question whether or not the plaintiff gave his services gratuitously, or on the credit of Palmer himself, not looking in any way to the overseers. Of course the evidence in this case is all the other way, but if it was not so, these facts are for the jury not for the Judge to determine. In 22 Am. & Eng. Encyc. of Law, 2nd ed., p. 947, it is said: "The terms 'poor,' 'indigent person,' 'persons in distress,' and 'paupers,' which are practically synonymous as used in the poor laws, include those who are destitute and in immediate need of relief." There was ample evidence I think to warrant a jury in finding for the plaintiff if any such issue had been directly raised, and the action of Price, coupled with his ex-

press directions, is evidence that he considered Stanley the legal settlement of Palmer and that the overseers of that parish would be liable for the expenses incurred: *Wing v. Mill*, 1 B. & Ald. 104.

This brings me to the other point in the case, which is this, that the contract made by Price as one of the overseers would not bind the defendants in their corporate capacity. That seems to me an inaccurate statement of a very general proposition. All corporate bodies contract by means of agents. It is a mere question of the agent's authority. And in determining that question it is to be remembered that all corporate bodies are not governed by the same rules. It is obvious that in many respects municipal corporations whose duties and obligations are discharged solely in the interests and for the benefit of the public, differ from the ordinary private or commercial corporations whose duties and obligations are discharged solely in the interests and for the benefit of the shareholders whose money is invested in them. It is true that the overseers of the poor for the several parishes were constituted bodies corporate—quasi corporations as they may be called. No powers however were given to them as a corporate body; they have no officers; no funds with which to maintain an organization, no head to call meetings, no office, and no duties to perform. The sole object of giving the overseers a corporate existence was to enable them to sue and be sued in the corporate name, when necessary, on contracts made by the overseers in their public capacity. There may be but one overseer or person discharging the duties of that office, in which case he is a corporation sole. In *Ross v. Town of Upper Mills*, 22 N. B. R. 168, Allen, C.J., at p. 171, says: "Now by the several statutes any person who has the charge or care of the poor in a town or parish, is an overseer of the poor and as such he or they (if more than one) is or are a corporation and liable to be sued on any contract they may make in their public capacity." Before that, unless especially stipulated to the contrary, they rendered themselves personally responsible, as was held in *Gardiner v. Matthew*, 5 N. B. R. 601. Beyond this it does not seem to me the mere act of constituting the overseers into a corporate body makes any change either in the duties or their methods of discharging them. Mr. Barry contended, and the Judge of the County Court seems to have so held, that in order to render the defendants liable in this

action the three overseers as the constituent members of the body corporate, must have met together and by some corporate act assumed the liability; and he cited *Robertson v. Trustees of Schools*, 34 N. B. R. 103, in support of that view. There is not in my opinion any analogy between the two cases. There was no pretence in that case that the two trustees who acted independently of the third had any authority express or implied to do what they attempted to do, that is, to terminate a contract entered into under the corporate seal. There was nothing in their course of business, nothing in the nature of their duties, nothing in the work which they had to do or in the recognized method of doing it, which implied any such authority. Mr. Barry made special reference to s. 2 of c. 180, which provides that two of the overseers with the consent of two justices may compel idle persons likely to become chargeable on the parish to work; and he sought to draw the inference that in no case could one act. If any inference at all were to be drawn from this special provision I should be disposed to draw the opposite one. In the first place the provision relates to a duty or an authority much more important than any other which the overseers are likely to have to discharge, so important that they were obliged to act with the consent of two justices, and it was one therefore which the Legislature would be much more likely to entrust to three than to two. The section was originally passed in 1786, 26 Geo. III., c. 43, s. 2, and this authority was then given to the majority of the overseers, the number not being at that time fixed. When the section was revised in 1854, the number of overseers was fixed at three and two were given authority to act. This was many years before the overseers were incorporated, and therefore at a time when they acted precisely as they do now, dividing up the work between themselves, acting individually without destroying co-operation. Other sections seem opposed to the defendants' contention in this respect. Section 90 of c. 165 C. S. 1903, "The Municipalities Act," provides for written returns to be made by the overseers of the poor containing a detailed account of all moneys placed in their hands or in the hands of any of them for the support of the poor. The corporate body has no treasurer—the overseers have all the same powers and authority—the money which they have to expend must go into the hands of individual overseers to be accounted for by each, and each is now as he was when *Regina v. Matthew*,

4 N. B. R. 543, was decided, liable to indictment for malversation of office without reference to his co-overseers. Take a case like the present where death is likely to ensue unless medical aid is obtained immediately, or the case provided for by s. 4 of c. 197, where expenses must be incurred in a similar exigency, though another parish must eventually pay them, how is it possible to wait till a meeting of the overseers can be held before any one of them can act except at the risk of incurring a personal liability? The indigent poor would probably die in the meantime. Authority to act and create the necessary liability would I think be implied in such a case from the very nature of it, and the duty which as a parish officer he is bound to discharge for the parish. [Reference to *Lamb v. Bunse*, 4 M. & S. 275.]

In the present case if Palmer were in fact poor and in need of relief, and his settlement was by virtue of his residence in Stanley, then that parish was liable to aid him; and the overseer necessarily under the circumstances had authority to contract for the surgical aid. That was a contract properly made in the discharge of a public duty upon which an action can be maintained against the overseers in their corporate name.

It is not necessary to discuss the question of notice under s. 12 until we have before us all the facts found by the jury. The plaintiff could not under any circumstances fail for want of notice as to all of his claim, for the evidence shews a special contract for his services made by the overseer, and it was after that and on the faith of that that the most of the services were rendered.

The appeal must be allowed with costs, and a new trial had.

HANINGTON, LANDRY, and McLEOD, JJ., concurred.

TUCK, C.J. (after stating the facts and reading s. 12 of C. S. 1903, c. 179): Now the language is plain; it is clear that after notice and request made to the overseers of the parish, and until provision shall be made for them, any person incurring any necessary expense for the relief of any pauper not liable for his support, can recover against the parish. It seems to be evident that no request was made to the overseers of the parish, and if any request was made at all, which is doubtful, it was made to Price, an overseer for the

parish of Stanley. How then can his act override the law? Nor do I think that any action of the municipality of York, whereby it ordered, on the recommendation of a special committee, that the plaintiff should be paid ninety dollars for his professional services to Palmer, can avail the plaintiff in this case. The council could only do what the law, c. 179, authorizes it to do. And I cannot see that the municipal council had any power until after notice and request made to the overseers of the poor of the parish.

Here if any notice was given and request made at all, it was not to the overseers, but only to Price as one of them.

If I had to decide this case simply on the meaning of the word "pauper," as named in the Act, I would say that the point should have been left to the jury. A man may be a pauper who has never been in an asylum for the poor, nor received parochial relief, and if a medical doctor render services to such a patient, he ought to be paid by the overseers of the poor, provided the Act, c. 179, has been complied with. Here there is no doubt Dr. Irvine performed the services for which he makes the charge, and it is unfortunate if he cannot get his pay from the overseers of the poor for the parish of Stanley, for it is quite clear that he cannot get it otherwise.

Leaving out the question whether or not Palmer was a pauper when the medical service was rendered by Dr. Irvine, it seems to me that on the other point this case is concluded by decisions in our own Court.

By c. 180, respecting support of the poor, s. 1, it is enacted that "the overseers of the poor in each parish shall be and they are hereby constituted a body corporate, under the name of The Overseers of the Poor of the Parish of _____ in the County of _____, and by such name may sue and be sued."

But surely this section does not give one overseer the power to bind the whole corporate body.

There are several cases in this Court, which appear to me to be binding, as to power of one overseer acting alone.

Robertson v. Durham School Trustees, 34 N. B. R. 103, holds that school trustees appointed under the provisions of C. S. 1876, c. 65, must act together as a board; and therefore that a notice of dismissal signed by two out of three

of them, of a teacher engaged under a written contract, which notice was not the result of deliberation in their corporate capacity, was insufficient.

A like decision was given in Hilary Term, 1906, in *Ex parte the Local Board of Health*: There an order, made by the Chief Justice, under the Public Health Act, was set aside because he had no jurisdiction. This Act is c. 53, ss. 72 and 73, C. S. 1903. In that case the Court followed the decision in *Robertson v. Durham*, 34 N. B. R. 103.

I need not cite other decisions. I think that this case is concluded by authority, and that this appeal must be dismissed with costs.

NEW BRUNSWICK.

FULL COURT.

FEBRUARY 10TH, 1906.

REX v. DAIGLE.

Intoxicating Liquors—Conviction for Sale without License—Convicting Magistrate Informant in another Prosecution—Convicting Magistrate Opponent of Issue of License to Defendant—Convicting Magistrate Expressing Opinion against Defendant—Costs Awarded to Complainant—Imprisonment Directed for Less than Statutory Minimum.

Motion to make absolute order nisi to quash conviction argued in Michaelmas Term, 1905, before TUCK, C.J., HANINGTON, BARKER, McLEOD, and GREGORY, JJ.

F. LaForest, for the motion.

J. M. Stevens, K.C., contra.

TUCK, C.J.:—This was a conviction before J. Amedee Charest, a justice of the peace for Madawaska county, where, by Hilaire Daigle was convicted for selling liquor in violation of the Liquor License Act.

An order absolute for a certiorari to remove into this Court, and an order nisi to quash this conviction, were granted at Chambers; and the motion before this Court is for a rule to make absolute this order nisi to quash.

The grounds upon which the order nisi to quash was granted, were, first, that the magistrate was interested, which was in this way; that the said Daigle had been convicted in June last before one James Lynch, a justice of the peace for Madawaska, on information laid by this magistrate, J. Amédée Charest, for an offence against the Liquor License Act, which conviction was at the time of the present trial before this Court on certiorari; second, that the justice in company with James Lynch circulated in the parish of Saint Jacques a petition against the granting of licenses in that parish that year, and encouraged people to sign it, the said Daigle being the only applicant that year for license in that parish; third, the said magistrate is disqualified because he expressed his opinion against the defendant; fourth, the conviction is wrong in awarding costs to the complainant; fifth, is bad for sentencing Daigle to be imprisoned (in default of payment of a fine of fifty dollars and costs), for sixty days instead of a term of "not less than three months," as required by s. 62 of the Act, C. S. 1903 c. 22.

Leaving out all the other causes which have been urged against this conviction, it does appear to me that the magistrate who convicted did not have an even mind. If there were another magistrate in the County of Madawaska before whom the information could have been laid, that ought to have been done, and thus have freed the jurisdiction from even the suspicion of bias. In this judgment I do not propose to discuss the several grounds which have been taken by the learned counsel who has argued that this conviction ought to be quashed. I confine myself to the one point of bias; and being fully of opinion that the magistrate was so influenced by his feeling, that without any disposition to do otherwise, in regard to this case, his mind was not even in giving his decision.

In *Ex parte Ryan*, 30 N. B. R. 256, the Court decided that "a magistrate is disqualified to try an information under the Canada Temperance Act, where an action for assault and false imprisonment is pending between him and the defendant, arising out of a trial of a previous information for a similar offence."

In *Regina v. Simmons*, 14 N. B. R. 158, it is held that "if the justice is interested in the prosecution, as where he was a member of a division of the Sons of Temperance by which

a prosecution for selling liquor was carried on, he is incompetent to try the cause and a conviction before him is bad."

In *Regina v. Justices of Yarmouth*, 8 Q. B. D. 525, it was held "that the chairman being a litigant in a matter similar to the other matters before the Court, was disqualified from acting as a justice, and that the orders were bad."

Without referring to other cases cited, and without deciding other points raised, I rest my decision upon the ground that the magistrate was disqualified because of interest, and therefore that the rule must be absolute to quash.

HANINGTON, J.:—I agree with the result, on the ground that the justice of the peace himself had prosecuted and obtained a conviction against the defendant, which conviction was removed into this Court on certiorari, and was at the time of the trial of this present case yet pending. It would come within the principle of *Regina v. Milne*, 20 N. B. R. 394, and cases of the like kind, which decide that litigation bona fide pending between the parties disqualifies either from acting as a sheriff to summon a jury or judicially on an information or action against the other.

MCLEOD, J.:—I agree that the conviction in this case should be quashed, but not on all the grounds taken.

The first ground is that the magistrate before whom this conviction was had was the informant and prosecutor on a former conviction (for selling liquor without license) against the defendant; and that that conviction was under appeal to this Court at the time the present conviction was made; and that under these circumstances the magistrate could not properly hear and determine the complaint in this matter. I think this ground good. An appeal from a conviction against this same defendant on a complaint made by the magistrate being pending before this Court, would I think disqualify him from acting. If the former case had been decided before the complaint in this case was laid, he would be qualified to act; but during its pendency he is not.

The second ground taken is that the magistrate was one of the parties who circulated a petition against the granting of licenses to sell liquor in the parish of St. Jacques. That is no ground for setting aside the conviction. A magistrate has the same right to his opinion as to whether liquor should be sold in the parish or county that any other man has, and

the fact that he signed a petition against the granting of licenses does not disqualify him or prevent him from performing the duties of his office; and if a complaint is laid before him for a violation of the License Act he is qualified to hear it.

Neither the third nor fourth ground taken can prevail.

The fifth objection is that the conviction is bad on the ground that the imprisonment imposed is not authorized by s. 62 of the Act. This section provides that a party convicted may be fined from \$50 to \$100 and costs, or in default of payment, imprisoned for a period of not less than three months. It is evident that a mistake in the legislation was made and that it was intended that the imprisonment should be for not more than three months. However, the Act was passed in this way, and has not been amended; and I suppose the Courts are bound by it as passed. The imprisonment imposed in this case is sixty days; that is less than the three months mentioned in the Act as a minimum imprisonment. As the right to award imprisonment is given the magistrate by the Act, I think he must follow the Act. And he could not therefore sentence the defendant to sixty days imprisonment, as the Act says he cannot sentence him for a period less than three months.

For these reasons I think the conviction must be quashed.

BARKER, J., concurred with McLEOD, J. GREGORY, J., took no part.

NEW BRUNSWICK.

FULL COURT.

APRIL 21ST, 1906.

MACAULAY v. JACOBSON.

Arrest—Capias—Deposit of Costs—Application for Repayment.

Application at Chambers, referred by McLeod, J., to the full Court, and argued on 11th April, 1906, before TUCK, C.J., HANINGTON, LANDRY, BARKER and GREGORY, JJ.

B. L. Gerow, for the application.

W. A. Ewing, for plaintiffs.

TUCK, C.J.:—This is a peculiar case. Jacobson was arrested on *capias* issued out of the Supreme Court and confined in gaol. The applicant came forward and deposited with the sheriff the amount which the Act provides for costs. Special bail has not been put in, but without that having been done an application was made to Mr. Justice McLeod to have the money returned, and for leave to put in and perfect special bail. Very properly, I think, the case was referred here, because the point was entirely new, and the Court is of opinion that the advice to Mr. Justice McLeod should be to refuse the order.

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NEW BRUNSWICK.

FULL COURT.

APRIL 21ST, 1906.

REX v. MORNEAULT.

REX v. TARDIFF.

*Intoxicating Liquors—Conviction for Sale without License—
Convicting Magistrate also Clerk of Peace and Clerk of
County Court—Territorial Jurisdiction—Form of Convic-
tion—Name and Style of Magistrate—Constitutionality of
s. 62 of Liquor License Act.*

Motion to make absolute orders nisi to quash convictions,
argued in Hilary Term, 1906, before TUCK, C.J., HANING-
TON, LANDRY, BARKER, and MCLEOD, JJ.

F. LaForest, for the motion.

A. Lawson, contra.

TUCK, C.J.:—These two cases involving the same points
were argued together.

Tardiff was convicted at the parish of Madawaska before
Barry R. Plant, a justice of the peace for the county of
Madawaska, for having on the 29th September, 1905, at the
parish of Saint Ann in the said county, unlawfully sold in-
toxicating liquor without the license by law required.

Morneault was convicted before the same magistrate at
the same place for a like offence committed at the parish of
St. Francis, Madawaska county, on the 13th November, 1905.

Orders absolute for certiorari and nisi to quash were
granted by a Judge in vacation, and the argument took place
before the Supreme Court in Hilary Term, 1906.

The grounds upon which the orders were granted are: First, that the magistrate who made the conviction was disqualified from trying the cause, (a) because after having been appointed justice of the peace he became and is clerk of the peace for the county of Madawaska, the one office being incompatible with the other; and (b) that he is also clerk of the County Court, which office is also incompatible with the office of justice of the peace; secondly, that the magistrate had no jurisdiction to try a case in the parish of Madawaska for an offence committed in the parish of Saint Ann (as in the case against Tardiff), nor for an offence committed in the parish of Saint Francis (as in the case against Morneault); thirdly, that the conviction is bad for not stating the name and style of the magistrate making the conviction (the conviction being signed "Barry R. Plant, J.P., Madawaska county"), and fourthly, that s. 62 of the Liquor License Act, C. S. 1903, c. 22, is ultra vires.

As to the first point, both (a) and (b), I fail to see how the office of justice of the peace is incompatible with that of clerk of the peace or that of clerk of the County Court. It is true that in some cases a clerk of the peace in that capacity gives advice to a justice of the peace, who has a criminal charge before him. But it does not follow from that fact that Mr. Plant was incapacitated from hearing the charges against Morneault and Tardiff; and no authority was shewn for this contention.

I can quite understand the decision in *Regina v. Douglas*, [1898] 1 Q. B. D. 560, but it does not touch this case. There it was held that the position of clerk to justices is incompatible with that of justice of the peace, and therefore where a person who held the position of clerk to justices was elected to another office which carried with it the position of justice of the peace, his acceptance of the latter office vacated that of clerk to the justices. But because Mr. Plant was clerk of the peace and clerk of the County Court, he was not thereby necessarily biased in trying charges for violation of the Liquor License Act.

In *Rex v. Tizzard*, 9 B. & C. 418, it was held that "where in the borough of W. the town clerk is appointed by the mayor, aldermen and bailiffs to hold the office during their pleasure, with a salary which they have power to alter in amount or to withdraw altogether, and one of the town clerk's duties is to attend all the corporate meetings of the

mayor, aldermen, bailiffs, and burgesses, and draw up minutes of their proceedings under their inspection, that the offices of alderman and town clerk are incompatible, and that an alderman by accepting the latter, vacated the former office." It seems to me that this case is not an authority here.

Henderson v. Sherborne, 2 M. & W. 236, is not applicable.

In *Ex parte McCoy*, 33 N. B. R. 605, where it was contended that the police magistrate of Fredericton was disqualified to act on the ground of pecuniary interest, it was shewn that in addition to his regular salary of four hundred dollars voted at the beginning of the year, the city council afterwards voted and appropriated to him for his services in connection with the enforcement of the Canada Temperance Act, the sum of one hundred dollars, which was paid out of a fund created by imposition of fines for violation of the Act, and the majority of the Court held that there was nothing in this point.

Having considered s. 62 of the Liquor License Act, and also s. 81 of the same Act, I am not prepared to say that these sections are ultra vires the Legislature of New Brunswick.

I think these rules should be discharged.

HANINGTON, LANDRY, BARKER, and MCLEOD, JJ., concurred.

The other objections upon which the orders nisi were granted were overruled on the argument: Rep.

NEW BRUNSWICK.

BARKER, J.

JUNE 25TH, 1906.

.IN RE McGIVERY.

Lunatic—Repairs to Estate — Collection of Rents — Agent.

Petition by the committee of the person and estate of James McGivery, a lunatic so found, for leave to make repairs and improvements to the estate of the lunatic; to

mortgage the estate for payment of debts due by the estate and the cost of proposed repairs; and for the appointment of an agent to collect rents and manage the properties of the estate. The estate consisted in part of a large number of leasehold and freehold properties in the City of Saint John, yielding a yearly rental of about \$2,200, and subject to ground rents of \$338.25. The rents of the estate were almost all small sums payable monthly, and there were about forty tenants on the rent roll. It was shewn that the proper management of the estate required a degree of personal attention the committee were unable to bestow, and that in the interests of the estate the collection of the rents and supervision and letting of the tenements should be confided to an agent. Repairs to buildings, estimated to cost \$300, were urgently required. To defray these and to pay off an indebtedness of the estate, leave to mortgage the estate for \$1,500 was sought. The application was heard on the 8th June, 1906.

D. Mullin, K.C., for the petitioners. It is necessary that the permission of the Court be obtained by the committee before undertaking alterations or improvements to the lunatic's estate: *Re Buckle*, 18 L. J. Ch. 264; *Ex parte Marton*, 11 Ves. 397. As an aid in the management of the estate the committee propose that an agent be appointed at a yearly salary of \$100. This amount will not exceed five per cent. on his receipts. An agent for the purpose sought here was appointed in *Re Westbrooke*, 2 Ph. 631, and a similar course was adopted in *In re Errington*, 2 Russ. 567.

BARKER, J., made an order in the terms of the petition.

NEW BRUNSWICK.

BARKER, J.

OCTOBER 12TH, 1906.

CITY OF SAINT JOHN v. BARKER.

Water and Watercourses—Pollution by Sewage — Right of Riparian Proprietor to Complain — Actual Damage not Essential—Special Use of Water authorized by Legislation.

Motion for injunction.

C. N. Skinner, K.C., for plaintiffs.

H. A. McKeown, K.C., for defendant.

BARKER, J.:—The object of this suit is to restrain the defendant from permitting the water of Lake Lomond to be polluted by the drainage from water closets in a building kept by her as a hotel at that place. There is no dispute as to the facts. Lake Lomond is a non-tidal body of water about three and a half miles long by one broad, about nine or ten miles from the City of St. John. The Mispec River issues from the foot of the lake for a short distance and then spreads out into what is known as Robertson's Lake, a body of water covering an area of about 90 acres. The river flows from the foot of this lake in its natural course to its outlet in the Bay of Fundy. The plaintiffs in the exercise of powers conferred upon them by the Legislature, the sufficiency of which is not questioned, have, for the purpose of utilizing the water of Lake Lomond as part of their system of water supply, constructed a dam at the foot of Robertson's Lake so as to make a reservoir there, and they have also connected the water of Robertson's Lake with that of Lake Latimer by a conduit, and from there the water is conveyed into the city. The defendant's hotel was opened for business by her husband in 1904. It was built on land owned by him fronting on the lake at the lower part and quite near the head of the Mispec River. It is used principally by guests in the summer season, though it is open for business all the year. It contains a bathroom and two water closets for the use of guests, and the deposits from these are discharged directly into the lake quite near the head of the river.

The right to the injunction is based on two grounds; (1) that the plaintiffs are riparian owners of property on the Mispec River and as such are entitled to have the water flow in an unpolluted condition along their land; and (2) that they are entitled under certain Acts of the Legislature to the use of the water of the lake free from pollution in the interests of public health, and for the use of the inhabitants of St. John. As to the first point it appears that the plaintiffs are owners in fee of five lots of land fronting on the Mispec River near its head; and it is claimed that as an incident to that property ownership they are entitled as of right to have the defendant restrained from polluting the water of the lake, even though they may not themselves be using the water in connection with the property, and though they may not be able to shew any actual

damage. As the Mispic River is the only outlet to Lake Lomond and as the natural flow of the water is down that river, it must necessarily pass along the plaintiffs' property which is below the defendant's property. The defendant describes that part of the river between Lake Lomond and Robertson's Lake as a rapid running stream with a gravelly bottom, and, except in dry weather, very turbulent, so that it is open during the winter, and that it has a width varying from three to ten feet. It appears that on the 1st of September last, some time before this action was commenced, the plaintiffs made a formal demand upon the defendant to stop discharging the sewage from her premises into the lake. She however did not do so. I agree with the plaintiffs' contention, and think that as the fact of pollution is not denied, the plaintiffs as riparian owners lower down on the stream are entitled to the intervention of this Court, notwithstanding there is no evidence of actual damage. As riparian owners they have the right to have the waters of the river flow through or past their land in their natural state, undeteriorated in quality, unless the defendant can shew, and there is no pretence that she can, a justification for her act by grant or prescription or some other way. (Reference to *Wood v. Ward*, 3 Ex. at p. 772, and *Crossley v. Lightowler*, L. R. 2 Ch. 478.)

As against a riparian owner it is not in my opinion necessary in the case of a natural stream polluted under a claim of right by another riparian owner further up the stream, to shew actual damage. In cases of pollution it is oftentimes difficult to shew it—in fact it may be impossible to do so. It exists all the same, it may be to an extent detrimental to the health of those who have a right to use the water. If it were otherwise what would be the effect? Take the present case. The defendant says: "I have had this water tested by experts and they report that it is not polluted." Suppose that within the next two years ten other riparian proprietors erect houses with water closets discharging into the lake, but in no greater volume than is discharged from the defendant's hotel now. An application of the same test then shews a positive pollution. Against whom are the plaintiffs to proceed? Each has the same answer as that now set up by this defendant, and if one can succeed why not all? And in this way the plaintiffs would be without remedy, and the water supply secured

to them for public uses would be injurious to health and unfit for use.

There is another feature of this case which may conveniently be mentioned here. The regulations of the Provincial Board of Health confirmed by the Lieutenant-Governor-in-Council were put in evidence. Rule XVIII. is as follows: "No sewer drain shall empty into any lake, pond or other source of water used for drinking and culinary purposes or into any standing water within the jurisdiction of this Board." And a penalty is provided for any disobedience to these rules. (Reference to Attorney-General v. Cockermuth Local Board, L. R. 18 Eq. 172).

In my opinion, the plaintiffs are entitled as riparian owners to have the defendant restrained from causing or allowing sewage or foul water to flow or be discharged from her premises into Lake Lomond above or within the limits of the plaintiffs' land, as was done in the case of Crossley v. Lightowler already cited. And perhaps for all practical purposes that would attain the plaintiffs' object inasmuch as none of the water so polluted can reach Lake Latimer without flowing along the plaintiffs' property on the river. The plaintiffs, however, take higher ground, and claim that their rights are not restricted within these narrow limits. And in view of a declaration of their rights under the Acts of the Legislature to which reference was made at the argument, I have thought it as well to express my views of this part of this case so that the whole matter might if the defendant wishes, go up on appeal and be determined without delay.

It may be stated as a general proposition that in cases of pollution to natural streams of water, where at all events the pollution is not a public nuisance, the right to complain is confined to the riparian owners below the point on the stream where the pollution takes place. It is a right incident to the property itself and inseparable from it, so that a mere right to use the water under license or grant from a riparian owner would not confer upon the licensee or grantee a right in himself to bring an action for damages arising from the pollution of the stream by any other riparian owners. It was upon this ground that the injunction originally granted in Crossley v. Lightowler was varied on appeal. In that case the plaintiffs claimed as riparian

owners and also under rights acquired under other owners. Their works were not on their own land fronting on the stream, but the water supplied for them was supplied from a point higher up the stream through pipes. Had they not been riparian owners they would not have succeeded in the action. That part of the order made by Wood, V.-C., restraining the defendants from causing or suffering foul water to flow into the river so as to affect the water drawn by the plaintiffs from the river for the use of their dye works, was omitted from the order of the Court on appeal, though the injunction went as to the water above or within the limits of the land owned by the plaintiffs as riparian owners. (See L. R. 2 Eq. at p. 298).

The same doctrine is laid down in *Stockport Waterworks Co. v. Potter*, 3 H. & C. 300; *Omerod v. Todmen Mill Co.*, 11 Q. B. D. 155, and many other cases. The present case is, however, not governed by these I have just mentioned. Whatever rights the plaintiffs have beyond those which they enjoy as incidental to their riparian holdings they have by statute. By Act 5 Ed. VII. c. 59, the plaintiffs are given important rights in reference to those waters altogether beyond and in access of any which an ordinary riparian proprietor has. Section 2 authorizes them to erect and maintain the reservoir which I have already alluded to, and to build the dam necessary for the purpose. Section 3 authorizes the plaintiffs to abstract from Lake Lomond a quantity not exceeding 7,500,000 gallons of water daily into Lake Latimer for the purpose of being transmitted therefrom to St. John for the use of the citizens. The case of *Swindon Waterworks Co. v. Wilts & Burke Canal Navigation Co.*, L. R. 7 H. L. 697, is similar in principle to the present. (The learned Judge referred at some length to this case and continued).

The case from which I have so freely quoted had reference to the quantity of water—the present one has reference to its quality. In principle they are, however, the same. The right to have water flow unimpeded in its natural channel, subject to its ordinary and reasonable use by the riparian proprietors, is no different or superior right than that it should be permitted to flow without being contaminated. In the case cited there was nothing in the Acts of Parliament expressly conferring upon the canal

company a right to have the water flow unimpeded, nor is there anything in the present plaintiffs' Acts which in words confers upon them a right to have the water authorized to be taken pure or uncontaminated. In both cases, however, they have by virtue of the powers conferred upon them, so far as is reasonably necessary for their purposes, the rights of riparian owners as to the waters which they are entitled to use, in the one case to sufficient to supply the canal, subject to the legal rights of owners above them on the stream, and in the other case sufficient to supply the daily maximum of 7,500,000 gallons of the water in its natural pure state—otherwise it would be useless to the city for the purpose contemplated by the Legislature. (Reference to *Milnes v. Mayor of Huddersfield*, 11 App. Cas. 511).

The plaintiffs are therefore entitled in exercising their riparian rights as arising out of, and incident to, the powers conferred upon them, to say to this defendant: "You have no right as against us to pollute these waters as you are doing, for we have the right for the purpose of extending our water system and supplying the inhabitants of St. John with water for drinking, domestic, and manufacturing purposes, to have the water flow down to us unimpaired in quality and in its natural state." Any other view would, as it seems to me, render the whole legislation useless.

I think the plaintiffs are entitled to an injunction restraining the defendant from fouling the water above or within the limits of the plaintiffs' land on the Mispic River, and from fouling the water of the lake or river flowing into the plaintiffs' reservoir, constructed by the plaintiffs under the power given by the Acts as mentioned in the bill.

Reserve question of costs till hearing.

NEW BRUNSWICK.

BARKER, J.

OCTOBER 12TH, 1906.

HAZEN v. WOODFORD.

Gift—Promissory Notes—Intention—Evidence.

A. O. Earle, K.C., and J. R. Armstrong, K.C., for plaintiff.

L. A. Currey, K.C., for defendant.

BARKER, J.:—In a suit brought for the administration of the estate of Margaret Hazen a question arose as to the liability of the defendant on two promissory notes made by her in favour of Mrs. Hazen; one for \$165, dated 21st November, 1902, at three months, payable at the Bank of Nova Scotia, and the other also at three months, dated 31st October, 1902, for \$95, payable at the same bank. These notes were discounted by the defendant at the Bank of Nova Scotia, and had not matured at the time of Mrs. Hazen's death, which took place on the 8th December, 1902. Both notes were dishonoured and Mr. Hazen, as administrator of the estate, was compelled to pay them to the bank, and did pay them on the 5th August, 1903, the amount with interest being \$266. As this was the only unsettled matter connected with the estate, it was submitted to me for determination without pleadings, by consent of all parties to the administration suit.

The defence set up is this: The defendant, who is a niece of Mrs. Hazen, says that in May, 1900, at the instance, or at all events on the suggestion of her aunt, she purchased a house on Peters street, for which her aunt said she would pay. She says that Mrs. Hazen did give her \$600 in cash at the time, and later on she gave her \$100 on the same account. The purchase money was \$1,100. Of that amount the defendant seems to have paid \$300 out of the money her aunt gave her, and the remaining \$800 of the purchase money she secured by a mortgage on the premises to Miss Smith. The remaining \$300 the defendant says she used in making repairs or alterations to the house. The evidence as to the transaction is not very clear, and for the sake of accuracy I will quote the defendant's own version of it. After stating that her aunt inspected the house before the purchase was made, and that her aunt said she would pay for it, she gives the following account of this transaction: "Q. Look at these notes—Did you get them from her? A. I did. Q. For what purpose, tell the facts. A. It was for building an ell on the house. Q. (The Court). What are the notes—Are they hers? A. Yes, they are her notes. Q. What did you do with them when you got the notes? A. I took them down to the bank and got the money. Q. What did you use the money for? A. For the house. Q. Is that the object for which they were given? A. Yes."

The defendant says her aunt wanted to build the ell and didn't have the money, so she gave the notes. She also says that she cannot tell what the improvements (which included the ell) cost, but that Crawford and another man built it, and the work was done in 1900, the year she bought.

On her cross-examination she was asked as follows: "Q. Were there any repairs made in 1900 to speak of? A. Well, every year there were some. Q. Anything Mrs. Hazen had to do with? A. No, I think not. Q. Do you say the proceeds of those notes went to pay for the repairs, those two notes? A. Yes."

Later on she was asked if her arrangement was that Mrs. Hazen was to repair the house as well as buy it. The answer was: "She looked at it and we knew we couldn't live in it without having it repaired."

The notes in question are renewals of notes originally given, as the bank's books shew, not in 1900, as the defendant says, but in 1901. The \$165 note was originally for \$195, dated 5th August, 1901. The \$95 note was originally for \$125, dated 23rd July, 1901. They had been renewed five times and during that period \$30 had been paid on each. So it is clear that this transaction had its origin a year after this ell was built, and these repairs were made, and cannot have been given for any such purpose, or for any purpose as it appears to me, connected with the purchase of the house. Mrs. Hazen was no doubt a very generous woman to her relatives; there is abundant evidence of that by her donations made at various times. She was constantly assisting them as well as others by indorsing their notes for their accommodation. There is abundant evidence of this. But I can scarcely think that if she had pledged her word absolutely to pay for this house she would not have done so, especially if she had indorsed notes so that the money could be raised for her convenience. She had a large estate and ample means for the purpose. Mrs. Hazen, no doubt, intended to assist, and did assist the defendant in procuring a home for herself. She certainly paid \$700 out of the \$1,100 purchase money, and for aught that I know she might, had she lived, given further assistance, but that she had created any liability to do so, either legal or equitable, I cannot agree.

Mr. Currey says an intention to make a gift creates no liability. I agree in that. But, he says, when that intention has been carried out and the gift made, it is irrevocable. Admitting that proposition also, how does it apply to this case? The \$700 was a gift and must remain so. But where is there any further gift? Mrs. Hazen gave the defendant nothing but her endorsement. How did that create a liability to her? It is true that it placed the defendant in a position where she could borrow money from the bank as she did, but that was not Mrs. Hazen's money, it was the bank's money lent to the defendant which Mrs. Hazen's estate had to pay by virtue of her indorsement of a dishonoured note of the defendant. I quite agree with Mr. Earle that as there was no consideration for any promise as relied on by the defendant, the making of this note is altogether immaterial. The bank might have made the defendant pay the note. She could not in that case have brought any action against Mrs. Hazen, and I think the mere fact that the bank made the estate pay, cannot alter the rights of these parties inter se. The effect of this defence, if it succeeded, would be to compel the estate of Mrs. Hazen to pay the defendant \$266, instead of her paying that amount to the estate as she promised to do. If it was a case of a contract which could be made the ground of an action, I should think the evidence altogether too loose and uncertain to warrant this Court in sustaining the claim under the rule by which Courts are governed in cases of claims against the estates of deceased persons.

The claim against the defendant must, I think, be paid.

NEW BRUNSWICK.

BARKER, J.

OCTOBER 19TH, 1906.

EASTERN TRUST COMPANY v. CUSHING SULPHITE
FIBRE COMPANY.

Mortgage—Mills—Machinery—"Plant."

A. O. Earle, K.C., and M. G. Teed, K.C., for plaintiffs.

J. D. Hazen, K.C., for liquidators.

BARKER, J.:—The sole question involved in this application is whether or not certain personal property which will be specifically mentioned later on, passed to the plaintiffs under their mortgage from the defendants as being included in the word “plant.” The mortgage conveys a piece of land, describing it by metes and bounds, “together with all the mills, mill buildings, machinery, fixtures and plant of the said company, in or about the said lands and premises . . . including all machinery, fixtures and plant hereafter acquired.” There does not seem to be anything in the mortgage itself suggesting any other meaning to the word “plant” than it would ordinarily have in an instrument of this kind relating to a mill property such as the defendants’ mill is. Judges as well as lexicographers have formulated definitions of the word in its general and ordinary sense. In *Yarmouth v. France*, 19 Q. B. D. 647, a case under the Employers’ Liability Act, Lindley, L. J., says that the word “plant” in its ordinary sense includes whatever apparatus is used by a business man for carrying on his business—not his stock-in-trade which he buys or makes for sale, but all goods and chattels fixed or movable, alive or dead, which he keeps for permanent employment in his business. Kekewich, J., in *Re Brooke*, 64 L. J. Ch. 27, a case arising out of a contract for the sale of a brewery, draws a distinction between the word “machinery” and the word “plant.” The former, he says, “includes everything which, by its action, produces or assists in production, and plant may be regarded as that without which production could not go on, such things as brewers’ pipes, vats and the like.” The editor of the Imperial Dictionary defines the word as meaning “the fixtures and tools necessary to carry on any trade or mechanical business.” And Worcester defines it as “the machinery, apparatus or fixtures by which a business is carried on.” Bouvier, Wharton, and Stroud follow their lay brethren except in the case of Bouvier, who introduces the word “appliances” in conjunction with the words “machinery, apparatus or fixtures.” I am not sure that these judicial definitions do not require more explanation than the word itself, before they can always be used to advantage. It is perhaps easier to decide what in the particular case in hand is not included in the word than to attempt any definition covering all cases.

There are four classes of property which the plaintiffs claim under their mortgage as "plant." The first is the office furniture, consisting of desks, chairs, a safe and such other articles as are usually found in such a place. I do not think they can be considered as plant in any sense of the word. The second class is a horse and carriage owned by the company, which are used for sending messages from the works to the city or for errands to the city in connection with the business. When not otherwise occupied the manager utilizes them for his own convenience. I do not think these are included in the term plant. The third class comprises two or three scows with waterproof canvas covers, which are used in lightering pulp shipped to Europe from the company's wharf to the steamer, and also in lightering cargoes of coal from ships to the company's wharf, where it is discharged by a steam apparatus used for the purpose. These I think are a part of the plant, though not included in the words "mill machinery" or the word "fixtures." They are altogether independent appliances, complete in themselves, contributing an important and necessary share in the work in the prosecution of the business of the company.

The fourth class of property claimed gives rise to more difficulty. The company has in stock about \$6,000 worth of what its officers call stores, and what I understand is known by that name in works of a similar character. They consist of a great variety of articles which are used, or at all events the greater part of them are used, for making repairs to the engines and various parts of the machinery to keep it in running order. If not kept on hand so that repairs could not be made until the necessary material could be procured, the engine or machine must be shut down and loss would result. Among other things is a large and varied stock of packing, nuts, valves, oil, pieces of machinery, files, axes, shovels and various other articles of a similar character, used and purchased solely for the purpose I have mentioned. With the exception of some minor articles which I shall refer to directly, all these stores are of no use in operating the mill or in carrying on the business, until they have been actually connected with some of the machinery used in the mill and thus become incorporated as a component part of it. Can it be said that as these stores accumulated for the purpose the company was adding to its plant?

Would it be so understood ordinarily? I think not. They did not of themselves in any way add to the manufacturing capacity of the mill. In fact, they could not be used in any way to do so until the existing machinery had become disabled when they were used for repairs and then the disabled machine was again fit for its work. Had these goods been made on the premises by machinery owned by the company, that machinery would, I think, pass as a part of the plant, but I cannot agree that the stores I have mentioned would pass under the mortgage as plant. They are not machines, they are not fixtures, they are not appliances or apparatus of themselves capable of use in carrying on the work, and are only useful when they become a part of the machinery in the way I have endeavoured to point out. The axes, shovels, and, I imagine, the files and some other articles, which seem to me to be similar to tools of a trade, would, I think, pass. They are ready for use as they are complete in themselves as tools or appliances used in carrying on the business.

The contention of the plaintiffs would, if it could be sustained, have the effect of transferring practically all the personal property of the company, except manufactured goods, as a part of the plant. I cannot give to the word so wide a meaning; neither do I think any of the cases go to this extent.

NEW BRUNSWICK.

BARKER, J.

OCTOBER 21ST, 1906.

BARNHILL v. HAMPTON & ST. MARTINS RAILWAY COMPANY.

Railway—Mortgage—Bondholder—Lien for Working Expenditure—Priorities—Crown.

C. N. Skinner, K.C., for plaintiff.

E. H. McAlpine, K.C., and E. G. Kaye. for claimants.

H. A. McKeown, for the defendants.

BARKER, J.:—This suit was brought for the foreclosure of a certain mortgage dated October 30th, 1897, made by the defendants to the plaintiff as trustee for bondholders to secure an issue of debentures and for the sale of the mortgaged property. A decree was made for the sale of the property.

but before the sale took place an application was made on behalf of the Dominion Government for an enforcement of a lien for the sum of \$1,470.42, which they claimed on the property in priority to the mortgage. By consent the property was sold under the decree with the understanding that if the claim had not been settled in the meantime the purchase money should be paid into Court to represent the property and be dealt with accordingly. The amount was not paid and the fund is now in Court to be dealt with as this Court may order. After the sale had taken place two other applications of a similar character were made—one on behalf of Isabella J. Wilson, who claims a lien for \$602.16 for repairs to rolling stock, and the other on behalf of Walter E. Foster and others, who claim a similar lien for \$2,451.89, of which \$1,233.89 is for advance of cash to the company to pay wages, and the remainder for the rental of one passenger and one freight car. All of the two claims last mentioned and all of the government claim, except three charges amounting to \$154, arose since February 1st, 1904, when the Railway Act of 1903 came into force by virtue of the proclamation of January 18th, 1904.

The defendants were incorporated in the year 1897 by an Act of the Provincial Legislature, 60 V. c. 89, which authorized the purchase of what is there spoken of as the southern division of the Central Railway, which extends from Hampton, where it connects with the Intercolonial Railway to St. Martins, a distance of about 29 miles. The defendants acquired this railway property and in order to secure an issue of bonds amounting to \$145,000, they made the mortgage in question, dated October 30th, 1897, and registered in the county of Kings, October 30th, 1897, and in the county of St. John, November 24th, 1897. The railway in question is a part of what was originally known as the St. Martins and Upham Railway, and the company then owning that road was authorized by an Act of the Dominion Parliament, passed in 1887, 50 & 51 V. c. 75, to sell its railway and franchise upon the conditions therein set forth. In the preamble to that Act it is recited that the railway connects with the Intercolonial Railway at Hampton and that it is declared a work for the general advantage of Canada, R. S. C. c. 109, s. 121. This section was re-enacted by s. 306 of the Railway Act of 1888 and continued in force until that Act was repealed by the Railway Act of 1903, which contains a similar provision.

The mortgage in question conveys "all and singular the line of railway of the party of the first part extending from its terminus at Hampton station on the Intercolonial Railway through the parishes of Hampton and Upham in the county of Kings, and through the parish of St. Martins in the county of St. John to its terminus in the town of St. Martins on the shore of the Bay of Fundy at Quaco Harbour, a distance of 29 miles more or less, together with all lands, buildings, bridges, fixtures, telephone or telegraph lines, and structures of every kind and nature whatsoever, and all sidings, side-tracks and turnouts now owned by the party of the first part or which may be hereafter acquired by it for the use of the said line of railway, and also all rolling stock, cars, engines, rails, ties, machinery, tools and personal property of every kind and nature whatsoever now held or hereafter to be acquired for the use of the said line of railway, and also all powers, privileges and corporate rights and franchises, including the franchises to operate the said line of railway, now held or hereafter to be acquired for the use of the said line of railway."

The railway legislation, both Dominion and Provincial, of the past 25 years, is so voluminous, and the statutes enacted during that period are so numerous that I have been compelled to rely largely in deciding the question now under discussion upon the legislative provisions to which counsel directed my attention.

The Railway Act of 1888, which I understand is the first Dominion statute containing general provisions as to the borrowing of money by railway companies and giving security on their property and franchises to secure it, provides by s. 95 that such bonds—that is bonds issued under the authority of that statute—shall be a first preferential claim and charge upon the company and the franchises, undertaking, tools, and income, rents and revenues and real and personal property at any time acquired except as provided by s. 94. That section authorizes the company to secure payment of its bonds by mortgage on all its property, assets, rents, and revenues present or future, but it provides—and this is the exception referred to in s. 95—that the rents and revenues shall be subject in the first instance to penalties incurred by reason of non-compliance with the requirements of the Act as to returns, "and next to the payment of the working ex-

penditure of the railway." The special lien thus created by the statute operated in a much more limited area than the power to mortgage does. The one is confined to the rents and revenues while the other extends to the company's property and assets, as well as its rents and revenues. The difference between the two is important. See *Garden v. London, Chatham, and Dover R. W. Co.*, L. R. 2 Ch. 201, and *Central Ontario R. W. Co. v. Trusts and Guarantee Co.*, [1905] A. C. 576.

This continued to be the law until the Act of 1903 came into force, by which the Act of 1888 was repealed. By s. 111 of the later Act provisions were made by which companies might issue bonds or other securities for the purpose of obtaining money, and s. 112 authorizes the company to secure such securities, that is the securities spoken of in s. 111, by a mortgage on the whole of such property, assets, rents, and revenues of the company, present or future, or both, as are described therein, but that such property, assets, rents, and revenues shall be subject in the first instance to the payment of any penalty then or thereafter imposed upon the company for non-compliance with the requirements of the Act and next to the payment of the working expenditure. Sub-section 3 of s. 112 provides that the company may except from the operation of any such mortgage, any assets, property, rents, or revenue of the company by specifying expressly in the mortgage the assets, property, rents, or revenues so excepted. The statutory lien for working expenditure is thus extended and is now co-extensive with the statutory authority to mortgage. The argument put forward by counsel for the government was that by virtue of the Acts to which I have referred the defendant company and its line of railway (being a work for the general advantage of Canada), are subject to the Dominion Railway Acts and that the lien attaches under both Acts. On the contrary, counsel for the plaintiff contends that it does not attach under either. He contends, as a part of his argument, that the defendant company is not subject to the Railway Act of 1903 for reasons which, in my view of the case, it is not necessary to discuss, because I think his contention is made out irrespective of that altogether. Assuming that this company was a work for the general advantage of Canada and subject therefore to the Act of 1903, how do these claims stand? The lien created by the Act of 1888 and which covers that part of the expenditure made be-

fore the Act of 1903 came into force, is expressly limited to rents and revenues. The fund in Court is in no way either the one or the other—it is the proceeds of a sale of the railway property itself, with its franchises conveyed by the mortgage. There was nothing sold under the decree upon which before the sale these claimants could have claimed a lien as being either rents or revenues of the company. The expenditure was, however, practically all made after the Act of 1888 was repealed, and the mortgage was made long before the Act of 1903 under which the lien is claimed was passed. It was never intended that s. 112 should be retroactive in its operation so as to impair the security on which the bondholders had lent their money by making the working expenditure a prior lien to theirs. That, as it seems to me, would be contrary to all canons of construction. The mortgage was not made under the Act of 1903, and it would require very clear language to destroy or impair an existing security such as this mortgage was: *Western Counties R. W. Co. v. Windsor and Annapolis R. W. Co.*, 7 App. Cas. 178.

An attempt was made to sustain the government lien on the ground of the Crown's prerogative. I am, however, not aware of any prerogative right in the Crown to take away the property of a subject in the manner proposed. If the liens were all sustained and the funds proved insufficient for their payment, as I understand would be the fact, it may be that in the competition which would then arise between the Crown and the subject, some question might arise such as that suggested, but that is a different matter, and one on which I express no opinion.

Entertaining the opinion which I have expressed, it is unnecessary to go into evidence as to the claims in order to determine whether the charges are for an expenditure such as the Act mentions.

NOVA SCOTIA.

GRAHAM, E.J.

OCTOBER 21ST, 1906.

STARRATT v. BENJAMIN.

Costs—Scale of Taxation—Set-off Reducing Claim to Lower Scale.

J. S. Bill, for plaintiff.

H. V. Bigelow, for defendant.

GRAHAM, E.J.:—The plaintiff claims on an account amounting to \$707.73. But the defendant had a set-off and in the settlement of the action the claim was reduced by that set-off to the sum of \$50. A dispute has arisen as to costs, whether they should be taxed on the \$80 scale or over.

It is plain that the plaintiff was entitled to costs on the higher scale, but the parties settled the action on the basis that the question should be decided by the Judge whether the plaintiff was entitled to costs on the lower scale or whether he should be deprived of costs altogether because he had not given credits. It was not whether there should be costs on the higher or on the lower scale. Therefore I do not decide the case as if it had been fought out.

The plaintiff must have costs on the lower scale. No costs of these subsequent proceedings.

NOVA SCOTIA.

GRAHAM, E.J.

OCTOBER 22ND, 1906.

HALIFAX HOTEL COMPANY v. CANADIAN FIRE ENGINE COMPANY.

Attachment — Absconding Debtor—Company — Service of Writ.

Motion to set aside an attachment. The affidavit upon which the attachment was obtained was made by the duly authorized manager and agent of the plaintiff company, having a personal knowledge of the facts deposed to, and set out that the defendant company was justly and honestly indebted to the plaintiffs for a balance owing for meals, board, and lodging supplied by the plaintiffs to the president and other officers and employees of the defendant company at the city of Halifax, between the 4th day of September, 1905, and the 20th day of February, 1906, at the request of the defendant company through its duly authorized president and general manager. Also that defendants were a body corporate incorporated out of Nova Scotia, and at the time of the accruing of the causes of action set forth, were doing business by an agent or agents within the province, and that said causes of action arose in whole within the province, and that defendants

had now ceased to do business within the province and had no agent within the province, or such agent could not be discovered by the plaintiff company.

H. Mellish, K.C., for plaintiffs.

W. F. O'Connor, for defendants.

GRAHAM, E.J.:—By O. 47, r. 6, it is provided as follows: “When such company” (a company incorporated out of Nova Scotia doing business by an agent within the province) “has ceased to do business within the province, or has no agent within the province, or an agent cannot be discovered, and such company has property . . . within the province, the proceedings may be taken against the company as are provided for in the case of absconding or absent debtors in Order 46.”

Under that Order provision is made for the issue of a writ of summons and a writ of attachment to be obtained on an affidavit of the existence of a debt and shewing that the defendant is absconding or absent out of the province. The sheriff, under the writ of attachment, is to levy upon any property of the debtor. And that gives the Court jurisdiction to proceed to judgment and execution. There is this provision: “A copy of the writ of summons shall be left at the last place of defendant’s abode, or, if he had no place of abode in the province, at the last place in which he carried on business.”

The plaintiffs are suing the defendant company for an hotel account incurred by one Pritchard, a guest at their hotel, as it is alleged, upon the defendant company’s request. It appears that Pritchard was, among other things, concerned in attempting to sell to the city of Halifax a fire engine of the defendant and during this business incurred the account. Leaving this hotel account unpaid, proceedings have been taken against the company under the provisions I have mentioned and the fire engine of the company has been levied upon.

This is an application to set aside those proceedings.

(1) I am satisfied that the company had an agent within the province by whom it did business, and that agent was the firm of Austin Brothers, and that at the time of the action that agency had ceased.

(2) It appears that to satisfy the provision applicable to natural persons, requiring the writ of summons to be left at the last place of abode or the last place of business of a defendant, the same was left at the Halifax hotel where the agent Pritchard stayed.

I will not say that the provision is not mandatory, although leaving a copy of a writ for an absconding man is not much good.

In practice the levy on the property has always been considered the essential requirement in order to give the Court jurisdiction to proceed to judgment. There must have been a free construction given to that provision when it was said in such cases as *Cochran v. Duncan*, Thomson's Reps. 80, and *Dudley v. Jones*, 1 R. & G. 306, that if the debt, the subject of the action, was contracted within the province, that was sufficient to give the Court jurisdiction, although there had not been personal residence or business transacted other than the contract.

In my opinion the dicta in those cases cover this one.

(3) Then the cause of action has been disputed. In my opinion a good cause of action has been set forth in the affidavit on which the attachment was obtained. If it is not supported at the trial by evidence the action will have to be dismissed. But it will not do to produce affidavits conflicting with that of the plaintiff and ask to have the writ set aside now. See *Dudley v. Jones* already cited.

(4) The last ground taken is that the writ of summons does not describe the defendant as an absconding or absent debtor. But assuming that the provision applicable to natural persons is made applicable to corporate bodies in this particular, which I do not concede, because a company is hardly ever an absconding or absent debtor as a natural person may be, this provision only says that the writ "may" describe the defendant as absconding, etc.

The application should be dismissed, but the costs will be costs in the cause, as it may turn out on the trial that the plaintiffs have really no cause of action against the defendants.

NOVA SCOTIA.

GRAHAM, E. J.

OCTOBER 23RD, 1906.

IN RE TOUQUOY GOLD MINING COMPANY.

Company — Winding-up — Mortgage of Assets — Debenture Holders—Priority as against Creditors' Claims and Liquidator's Commission and Disbursements.

J. P. Bill, for the liquidator and creditors.

H. B. Bigelow, for the mortgagees.

GRAHAM, E.J.—This is a motion to determine the priority of payments and the liquidator's commission.

This company had mortgaged its property to one Seymour E. Bigelow for \$1,557.89, and Racine, Perrett, and Kaulbach had mortgage debentures of the company for \$11,680, \$200, and \$806.87, respectively. Two creditors, F. H. Laurence and H. H. Fuller & Co., had small claims against the company and they recovered judgments and afterwards applied to put the company into liquidation as an insolvent company under the Dominion Winding-up Act, and they succeeded although the debenture holders opposed the application. The securities of the debenture holders were attacked but were upheld. Finally the property of the company was sold by the liquidator, the Eastern Trust Company, and bid in for some \$3,000. Now there is a contest as to the priority of the various claims and the costs. These two creditors who had obtained judgments for their debts and the mortgagees are at variance.

The order for winding up was made on the 25th September, 1905, and that appointing the liquidator on the 18th October, 1905.

The liquidator's account up to September 7th, 1906, amounts to \$963.08 irrespective of remuneration. It is principally for wages of a caretaker for the mine—possibly to keep it from flooding.

In December, 1905, the liquidator was spoken to by the solicitor of the mortgagees about the necessity of promptly

winding up the company, and he wrote two letters, on the 10th of January and the 6th of February, 1906, to the same effect, complaining deeply of the delay and the expense consequent thereon.

The contestation of the debenture holders' claims was a short matter. The notice of contestation was given on the 9th March, 1906, and the decision thereon upholding the debentures was filed on the 21st May, 1906. There remained nothing to be done but to sell the property—yet the liquidator has taken nearly a year over the winding up. I think it is very hard on the mortgagees to have this account paid out of the assets covered by their security when a foreclosure or redemption would have extended over a very much shorter period of time. But it appears that for the expense of preservation and realization of the property the liquidator is entitled to be indemnified at the expense of the mortgagees' assets if it was for their benefit. But this expense is entitled to priority over costs of the petition for winding up and costs and remuneration of the liquidator.

In Emden on Winding-up of Companies, p. 281, it is said: "The above rule however does not affect the rights of mortgagees, and principal and interest must be paid out of assets specifically mortgaged in priority to any costs which are not incurred for their benefit."

And, p. 284: "Where property which is being realized in the winding up is subject to incumbrances the liquidator's costs, charges and expenses of realization are paid in the first place, and then the principal, interest and costs of the incumbrancers in priority even to costs incurred by the liquidator in carrying on the company's business for the benefit of the creditors, the general costs of the winding up coming last. The liquidator's costs of preservation of the property are as between the incumbrancers and the company payable by the company; but the liquidator is entitled to be indemnified out of the fund for so much of such costs as is not paid to him out of the company's assets." See also Buckley on Companies, p. 341.

The judgment creditors rely upon the Winding-up Act, s. 91, as creating priority for these costs of the petition. It is similar however to s. 144 of the English Companies Act.

Under s. 144 of that Act, in Buckley on Companies, p. 378, there is this note: "All 'other claims' must mean all other claims at the date of the winding up. . . . If the company's property is mortgaged; if, that is, the company is entitled only to an equity of redemption, it is the equity of redemption only that is assets for the payment of costs. The liquidator's costs must therefore, of course, stand behind those of the mortgagees, save in so far as the liquidator's costs are costs of preservation or realization of which the mortgagees have had the benefit:" *Ex parte Grisell*, 3 Ch. D. 411; *In re Anglo-Austrian Printing Union*, [1895] 2 Ch. 891.

The winding up was not in the interest of these mortgagees. The validity of their securities could have been called in question by other proceedings.

It is unnecessary for me to consider the order of priority any further as the liquidator's costs of preservation and realization and the mortgagees' claims for principal, interest and costs will exhaust the fund.

As between the incumbrances there appears to be a question.

The mortgage to Bigelow will have priority. In respect to the mortgage to secure the debentures it appears that it was not filed in the Mines Office (the property is principally a mine) until after the judgments of the judgment creditors were filed there. One of the judgment creditors does not claim priority, but H. H. Fuller & Co. do. Then it is contended that this firm had knowledge of the mortgage through the firm of solicitors which recovered the judgment for it. One of the members of that firm was president of the company and knew all about it. Evidence will have to be taken and this question determined. The fact of the omission to file the mortgage was only mentioned in the contestation of Racine's claim.

I fix the liquidator's remuneration at the sum of \$150 in case there is some means of obtaining it other than out of the fund.

Further consideration adjourned.

NOVA SCOTIA.

GRAHAM, E.J.

OCTOBER 24TH, 1906.

REX v. REYNOLDS.

Criminal Law—Obstructing Highway—Nuisance—Form of Indictment.

W. M. Christie, K.C., for the Crown.

H. W. Sangster, for defendant.

GRAHAM, E.J.—The defendant has been indicted in the following terms: "On the 16th day of July in the year 1906, and on and at divers other days and times before and since that date, unlawfully and injuriously did, and he does yet continue to obstruct the highway, the same being a public highway of the district of the municipality of East Hants, by erecting fences on and across the said highway, and thereby unlawfully did commit and does continue to commit a common nuisance endangering the comfort of the public, and which common nuisance did at Tennycape aforesaid on the said 16th day of July, 1906, occasion actual injury to George W. Smith and others."

There is a motion to quash the indictment.

By the Criminal Code, s. 191, it is provided as follows: "A common nuisance is an unlawful act or omission to discharge a legal duty, which act or omission endangers the lives, safety, health, property or comfort of the public, or by which the public are obstructed in the exercise or enjoyment of any right common to all Her Majesty's subjects."

Section 192: "Everyone is guilty of an indictable offence and liable to one year's imprisonment or a fine who commits any common nuisance which endangers the lives, safety or health of the public, or which occasions injury to the person of any individual."

Section 193: "Any one convicted upon any indictment or information, for any common nuisance other than those mentioned in the preceding section, shall not be deemed to have committed a criminal offence; but all such proceedings

or judgments may be taken and had as heretofore to abate or remedy the mischief done by such nuisance to the public right."

Turning to this indictment, it is clear that the pleader has not brought it under the provisions which would make the act charged a criminal offence.

He does not state that there has been an injury to the person of anyone. That allegation of actual injury must therefore be regarded as surplusage. If it had alleged injury to the person it would have made the count bad on the ground of charging two offences, one a criminal offence and under the Code and one otherwise.

After the Parliament of Canada has divided nuisances into those which constitute criminal offences and those which do not, one cannot probably look in the Statutes of Canada for further provisions on the subject of those nuisances which are not criminal offences. We have to look to the proceedings which, before the existence of the Criminal Code, might be taken to abate or remedy the mischief, that is, to the common law.

In my opinion, at common law, the indictment is not sufficient. It does not close with the formal words "to the common nuisance," etc. It is not sufficiently certain. It should appear in what way the obstruction interferes with the comfort of the public,—whether to those passing along the highway, or residing near it or otherwise.

In 3 Chitty's Crim. Law, p. 607a, note, it is said: "Every proceeding, whether for nuisances arising from neglect of duty or encroachment on the public conveniences, must contain the words 'to the common nuisance of all the liege subjects of our Lord the King residing, passing or using,' etc., according to the facts, in its conclusion."

Then I think the locality of the road and the locality of the obstruction are not described with sufficient certainty. Of course the authorities shew that the termini need not be mentioned. But there ought to be some description of the highway, where it is, etc. It is merely called a public highway of East Hants. And as to the locality of the obstruction it is elementary that it must appear that the nuisance has been committed in the county in which the indictment is found.

Granted that judicial notice can be taken of the fact that the municipality of East Hants to which the road belongs is within the county of Hants where the indictment was preferred, the same cannot be said of Tennycape, where the prosecutor and others are alleged to have been injured. It is not alleged where the nuisance to the public was committed, or where it operated as a nuisance to the public. The highway is not alleged to be wholly within East Hants.

In Wood on Nuisances, p. 986, it is said: "So too in an indictment for an obstruction of a public street or highway the street or highway should be definitely described, as well as the nature and extent of the obstruction."

I refer also to Commonwealth v. Brookfield, 8 Pick. 463.

In my opinion the indictment should be quashed.

NOVA SCOTIA.

RUSSELL, J.

OCTOBER 26TH, 1906.

BRINE v. SHEARING.

Contract—Building Contract—Extras.

Trial of action for payment for extras on a building contract tried before Russell, J., at Halifax.

J. L. Barnhill, for plaintiff.

J. J. Ritchie, K.C., for defendant.

RUSSELL, J.:—This is a claim for extras on a contract to change a pitch-roof house to a flat-roofed house. There were no proper plans or specifications, but a document was drawn up which I have no doubt was meant to contain everything that was required to make the change, and after the work had begun a further and somewhat more detailed memorandum was made which the plaintiff says was not a more precise memorandum of the first agreement but included extras. I find against the plaintiff in respect to this contention.

The work was not satisfactorily finished and indeed was not finished at all by the plaintiff, but some things were done that were not included in the contract. Some of these for which the plaintiff claims were in substitution for things

called for by the contract, and done by agreement between the plaintiff and the defendant's wife. Others of the things claimed for as extras were clearly included in the contract, but the plaintiff claims for them as extras because they were not carpenter's work, but painter's or glazier's work. But the agreement is not confined to carpenter's work. It is an agreement to change a pitch-roofed house into a flat-roofed house, and expressly provides for other work than that of a carpenter. The plaintiff enters into his agreement in the capacity not of a carpenter merely, but of a contractor.

The plaintiff cannot charge for extras without an agreement between himself and the defendant for extras, and I cannot find that anything extra was ordered by the defendant. A cornice and centres were ordered by his wife, the obligation to pay for which as extras the defendant recognizes, but the cost of these at a fair estimate over and above the material which was paid for by the defendant would be an amount below the jurisdiction of the Court.

The estimate by the defendant's witnesses of the amount required to complete the job is, I think, greatly exaggerated, but with all proper allowances I think it would be enough to offset any possible amount that the plaintiff could justly claim for extras.

I was not favourably impressed with the demeanour of the plaintiff, whose record moreover is bad, and I have been inclined to discredit him wherever his testimony is in conflict with that of the defendant.

The claim will be dismissed.

NOVA SCOTIA.

GRAHAM, E.J.

OCTOBER 26TH, 1906.

RUSSELL, J.

OCTOBER 27TH, 1906.

REX v. BRINDLEY.

Criminal Law—Assault — Imprisonment Ordered for Sixty Days—Statutory Maximum Two Months.

Motion before Graham, E.J., at Chambers for a habeas corpus for the release of a prisoner confined in the city prison

at Halifax under a conviction for common assault made by the stipendiary magistrate for the city of Halifax.

J. J. Power, for the prisoner.

No one contra.

GRAHAM, E.J.:—The defendant was convicted on a summary trial of an assault and has been sentenced to imprisonment for the term of 60 days with hard labour. The maximum term in the Code is two months. The defendant is undergoing imprisonment now upon this sentence. There is no intimation that the defendant has applied to have a case reserved, nor is there anything suggested by the defendant's counsel which will interrupt that sentence so that it may have to be served at another time when months are shorter.

I think that the defendant should make out a case which shews that the sixty days' term she has received will exceed the two months' term provided by the statute, or at least that there is a reasonable possibility of that result happening. There is, in my opinion, no reasonable possibility of the sentence exceeding the statutory period and therefore no ground for discharging her.

In *Regina v. Gavin*, 30 N. S. R. 162, the application was for a writ of certiorari to quash the conviction. There was a fine with a provision for distress, and in default of distress a term of imprisonment for 90 days, the statutory term being three months. In that case it might possibly happen that the term of sentence would turn out to be excessive. But here, where the limit of the sentence is certain and fixed, it having already commenced, and there being no suggestion as to any possible chance of its turning out to be excessive, I think the prisoner should not be discharged.

The motion was renewed before RUSSELL, J., who gave judgment as follows:

RUSSELL, J.:—I am unable to distinguish this case from the reported case of *Regina v. Gavin*, 30 N. S. R. 162, in line with which is the case of *the City of Halifax v. Clusen*, 6 R. & G. 521. If the conviction may so operate as to detain the prisoner in jail for a longer period than she would be detained if the justice had inserted "two months," as the law directs, then it seems to me it must be a bad conviction. Prisoner's

counsel has pointed out several ways in which this may happen. Among other things the prisoner, it is suggested, may be let out on a ticket of leave, and sent back to finish her sentence on the 1st of February. Or it is further suggested that I might now refer the matter to the full Court, and admit the prisoner to bail in the meantime, when the same consequence might follow. There may be some answer to these contentions which would have been made had the Crown seen fit to oppose the motion, but I see no answer, and according to present light I must discharge the prisoner, which I do with the less reluctance, as it appears that the conviction is merely for a common assault at the instance of a private prosecutor. If the offence had seemed to be serious, I should have preferred to have the case considered by the Court in banco.

NOVA SCOTIA.

RUSSELL, J.

OCTOBER 27TH, 1906.

WRIGHT v. KAYE.

Gift—Undue Influence—Fiduciary Relationship — Transaction between Trustee and Beneficiary.

Action by a cestui que trust against her trustee to set aside a deed, tried before RUSSELL, J., at Halifax.

C. P. Fullerton, and J. P. Foley, for plaintiff.

R. E. Harris, K.C., for defendant.

RUSSELL, J.:—The question in this case is whether a conveyance by which the plaintiff deeded to her brother the defendant without consideration her interest in the property of her late father should be set aside, the contention for the plaintiff being that the defendant was the trustee under the father's will to sell the property and distribute the proceeds among the beneficiaries, one of whom was the plaintiff. It is contended that the fiduciary relation thus existing between the plaintiff and defendant made it legally impossible for the plaintiff to make a gift to the defendant that would not be voidable at her option unless she had independent advice

and acted on that advice. As to this last condition the plaintiff's contention is based on the language of Farwell, J., in *Powell v. Powell*, [1900] 1 Ch. 246, which Mr. Ashburner says is not consistent with the authorities. The proposition that the plaintiff must have acted on the independent advice given her in order to make her conveyance valid is not necessary to the plaintiff's case because no independent advice was ever sought or given.

Mr. Pomeroy in his discussion of the subject in ss. 957 et seq., distinguishes between two classes of cases in one of which the transaction between trustee and cestui que trust is voidable at the suit of the beneficiary, there being a conclusive and not merely rebuttable presumption of invalidity, while in the other class of cases the transaction is not necessarily voidable but may be valid, there being however a presumption of invalidity which can only be overcome by clear evidence of good faith, of full knowledge, and of independent consent and action. The first class of cases includes those instances in which the party purporting to act in his fiduciary character deals with himself in his private and personal character without the knowledge of his beneficiary. The second class includes those cases in which the two parties, trustee and cestui que trust, consciously and intentionally deal with each other, each knowingly taking a part in the transaction, and there results from their dealing some conveyance or contract or gift. In this class of cases, which includes the case before me, the transaction is not necessarily voidable but only presumptively invalid. But here again a distinction has to be made between a purchase by the trustee and a gift from the cestui que trust. The doctrine which makes the transaction presumptively invalid "is enforced with the utmost stringency when the transaction is in the nature of a bounty conferred upon the trustee,—a gift or benefit without full consideration. Such a transaction will not be sustained unless the trust relation was for the time being completely suspended and the beneficiary acted throughout upon independent advice and upon the fullest information and knowledge." The foregoing is from the text in s. 958. In a foot-note in the third edition written by the author and not merely among those inserted by his editor, the writer says: "The independent advice of a third person does not seem to be an essential feature in purchases for a fair consideration, but it does seem to be indispensable in transactions having the nature of gifts

whereby the trustee obtains some benefit, as, for example, a release of claims against the trustee given by the cestui que trust as a bounty." (2 Pomeroy, 3rd ed., p. 1758, note 4.)

The language of Lindley, L.J., in *Allcaird v. Skinner*, 36 Ch. D. at p. 185, suggests a modification of the principle as expounded by Pomeroy. He says that where a gift is made to a person standing in a confidential relation to the donor the Court will not set aside the gift of a small amount simply on the ground that the donor had no independent advice. In such a case some proof of the exercise of undue influence of the donor must be given. This dictum is founded on the language of Turner, L.J., in *Rhodes v. Bate*, L. R. 1 Ch. at p. 258. But Turner, L.J., confines his remarks on which Lindley, L.J., founds his dictum to the case of a mere trifling gift.

The gift in this case was not a mere trifle. Relatively to the whole amount of the estate it could not even be called small. I think, therefore, that I cannot go far astray if I adopt Mr. Pomeroy's statement of the principle to be deduced from the cases as giving probably more trustworthy results than my own examination of the cases would be likely to yield.

The fiduciary relation in the present instance was twofold. The defendant was one of the executors of his father's will, to whom the property in question was devised in trust to sell it and divide the proceeds among his children, one of whom was the plaintiff. The defendant was also a son of the testator by his first marriage, and plaintiff was a daughter by a later marriage. After the death of the testator, the defendant was accorded a controlling position in the family, and was looked up to by the plaintiff as a father. One of his own daughters was older than the plaintiff, his sister. It is argued for the defendant that no presumptions can be drawn from this relationship and these circumstances because the plaintiff at the date of the conveyance was over twenty-one, or rather more than a twelve-month over twenty-one, that being the age at which parental influence is supposed to cease. But I think the mere question of years has little to do with the matter. Plaintiff was living under the same roof with defendant and it is contended was treated as if one of his children, and there are cases where persons much

older than the plaintiff have been held to be so under the dominion of other members of the family, that the presumption of invalidity has been applied, or if this statement be inaccurate, as it may be, it has at all events been held that the conveyance must be set aside. But I think my statement in the form first presented is correct. See *Sharp v. Leach*, 31 Beav. 491, second paragraph of the head note. The settlor in this case was forty-six years old. Apart, however, from the fiduciary relationship last referred to I do not see why the principle relating to gifts from cestui que trust to trustee should not apply. If it does not apply and Mr. Pomeroy has correctly interpreted the authorities, the gift in this case was voidable at the instance of the plaintiff if she afterwards saw fit to change her mind. She had no independent advice from any third person, and could not without such advice make a gift that would not be voidable at her option.

The defendant sets up acquiescence as a defence, or perhaps I should say that he relies on an express affirmation of the transaction after the relationship which made it voidable had ceased. I have no doubt that after the marriage of the plaintiff, and, therefore, after one of the relations had ceased on the strength of which the conveyance is attacked, she did more than once express her satisfaction with what she had done. But if she was not then aware that it could be undone I attach very little importance to those expressions. It would be a very unphilosophic sort of person who would not wish to be satisfied about a transaction that was irrevocable, and a latent misgiving about the matter or even positive discontent might easily be accompanied by such outward expressions as the witnesses report. The evidence is that as soon as she discovered that the transaction was not binding upon her she took steps to have it avoided. In a case like this I do not think that there is any field for the operation of the maxim which would impute to the plaintiff a knowledge of the law. If she was ignorant of the principle which is now invoked as authority for avoiding the transaction she was ignorant of her rights and was not by her delay acquiescing in the transaction or electing to affirm it. This seems to have been the way the matter was viewed by Cotton, L.J., in *Allcaird v. Skinner*, 36 Ch. D. 185: "Delay in asserting rights cannot be in equity a defence unless the plaintiff were aware of her rights. In her evidence she stated that till

long after 1879 she did not know that she could set aside the gift."

I understood the counsel for plaintiff to say at the trial that he would be satisfied with a charge on the property for the value of the plaintiff's interest. I think the plaintiff is entitled to this and if the matter can be adjusted in this way it will obviate the necessity of discussing the further question whether there are any equities to be worked out in view of the fact that the defendant, on the faith of the conveyance, has expended on the property about as much as it was worth at the time when the conveyance was made.

NOVA SCOTIA.

LONGLEY, J.

OCTOBER 29TH, 1906.

• NAUGLE v. HIRTLE.

Promissory Note—Consideration — Release of Claim afterwards Found to be of No Value.

Action on a promissory note tried before LONGLEY, J., at Bridgewater.

S. A. Chesley, for plaintiff.

D. F. Matheson, for defendant.

LONGLEY, J.:—This was an action on a promissory note made by defendant in favour of the plaintiff for \$40.

The defence, stated briefly, is as follows: Caine, a barber, was a tenant of defendant in Lunenburg, and a quarter's rent was overdue. One evening it came to the knowledge of defendant that plaintiff was removing the furnishings of Caine's shop under an assignment under the Collection Act. The defendant immediately issued a warrant of distress and took possession of said furnishings and afterwards advertised them for sale. The goods seized would probably have realized more than the amount of rent due and expenses and plaintiff's solicitor went to defendant and stated that plaintiff had a good title to the goods under and by virtue of his assignment and recommended defendant to buy him out for

\$40. By this time it was discovered that one Coldwell had a bill of sale of said goods registered prior to the plaintiff's assignment, and plaintiff's solicitor told the defendant that Coldwell's bill of sale was worthless and that by getting plaintiff out of the way he would have the property in the whole goods so taken in distress. This the defendant agreed to do and gave his note for the amount agreed upon, \$40, now in action.

The defendant claims that as Coldwell asserted his bill of sale and got the residue of such goods after defendant's rent was paid, the consideration for which he gave the note wholly failed and that plaintiff should not recover.

Upon a careful consideration of all the circumstances I am not disposed to think there was a total failure of consideration. When defendant gave the note to plaintiff's solicitor he took from him the following receipt: ".Received from L. A. Hirtle a note made by him for forty dollars in favour of Edward Naugle, which is in settlement of the claim of Edward Naugle upon certain goods lately of C. F. Caine, and which said Hirtle has advertised for sale this day under a claim for rent." The defendant swears he did not read or consider this receipt, but I scarcely think this avails to a business man. But he contends that Naugle sold him goods which he had no title to, and that consequently the consideration wholly fails.

But I think the plaintiff's contention more reasonable and supported by the receipt that the plaintiff being in defendant's way in getting hold of all the goods, which would be necessary for the use of any other barber tenant, agreed to get out of his way for forty dollars, and as a matter of fact he did get out of his way, and, therefore, I think the consideration did not wholly fail.

One other point must be considered. Was the opinion offered by the plaintiff's solicitor, that Coldwell's bill of sale was no good, a fraud on the part of plaintiff which avoids the transaction? I think not. The defendant, I think, acted on the advice of plaintiff's solicitor at his risk, and, even if there was such a misrepresentation on the part of the solicitor as prejudiced the defendant, I think his remedy is against the solicitor himself as there was no evidence whatever that the plaintiff had anything to do with any such misrepresentation.

The bill of sale of Coldwell was put in evidence and Coldwell was called to prove that his bill of sale represented honestly and bona fide the amount due on the face of it, and nothing was offered which cast any cloud upon its validity. But there has been no contest in the matter and no judicial determination of its validity or otherwise, and I do not think that I am in a position to determine that it was good and superior to Naugle's assignment. That issue is not before me. It may have been good, or it may have been void if regularly contested. But I do not think I can hold it to be so effective against plaintiff's title as to warrant me in finding no consideration for the note.

In view of these considerations, I have no alternative but to hold that the note was given for an existing consideration that has not wholly failed, and enough to justify the plaintiff's action on the note.

Judgment for plaintiff for \$40, amount of note and interest.

NOVA SCOTIA.

LONGLEY, J.

OCTOBER 29TH, 1906.

CONRAD v. SIMPSON.

*Judgment—Arrest of Defendant — Unauthorized Release—
Action to Revive Judgment—Arrears of Interest.*

Action to revive a judgment tried before LONGLEY, J., at Bridgewater.

V. J. Paton, for plaintiff.

J. A. McLean, K.C., and C. L. Freeman, for defendant.

LONGLEY, J.:—The facts in this case are simple and not disputed. The plaintiff had a judgment against the defendant. When it was in force he caused an execution to be issued under which the defendant was arrested and placed in jail in Lunenburg. His solicitor had prepared papers for his examination before two commissioners under the Judgment Debtors' Act and he was to have come up for examination on a certain Monday. Before that, I think on Saturday night, the defendant was set at liberty. The jail records shew the entry of his admission to the jail and of his release by order of the sheriff, who has since died, and no one is able

to get any information as to his authority or his reason for releasing his prisoner. The plaintiff's solicitor testified that no authority whatever had been given by himself or by the plaintiff for this release.

The judgment having been more than twenty years entered, the plaintiff has brought an action to revive it. The defendant contends that having been once arrested the judgment is satisfied and plaintiff cannot renew his judgment, and his counsel has furnished a lengthy and elaborate brief citing a large number of cases, which I have examined and given full consideration.

The law on this point is very old. If a plaintiff arrest his judgment debtor and release him he can never be taken upon that judgment again. But a condition of things very similar to the present case arose in the case of *Bassett v. Salter*, 2 Mod. 136, and the Court held that in the case of an escape there was no bar to further pursuit of the judgment. The release of the defendant in this case was largely in the nature of an escape. It was, so far as the evidence goes, unauthorized and unlawful. At all events it was the result of no action or consent on the part of the plaintiff, and I therefore think he is entitled to recover in this action.

I am a little in doubt as to whether more than six years' interest can be recovered. It is quite true that the six years' limitation of interest applies to land or liens respecting land. But if the plaintiff should recover the full amount now claimed he might pursue his remedy against the land of defendant at any time on the faith of the judgment south. I therefore, while not clear upon the matter, think that the plaintiff in this action should only recover the face of his judgment with six years' interest and costs of this action less the sums paid on such judgment.

NOVA SCOTIA.

LONGLEY, J.

OCTOBER 29TH, 1906.

WHITFORD v. ARMSTRONG.

Trespass—Possession of Plaintiff—Writ of Possession against Previous Occupant.

Action of trespass tried before LONGLEY, J., at Bridgewater.

V. J. Paton, for plaintiff.

J. A. McLean, K.C., and C. L. Freeman, for defendant.

LONGLEY, J.:—In this case plaintiff shewed a complete paper title to the land in dispute from the grant of the Crown through several intermediaries until the fee was vested in himself.

The only point in controversy was as to whether plaintiff had sufficient possession to enable him to maintain trespass against defendant who cut the hay on plaintiff's land under license from Mrs. Wakefield Millet.

The plaintiff's immediate predecessor in title, David Whitford, had taken action in ejectment some years ago against Wakefield Millet, who lived in a house and occupied a lot immediately adjoining the land now in dispute, and who attempted to use Whitford's land as well as his own. The action was not defended and the sheriff under a writ of possession put David Whitford into possession of the lot.

About five years ago David Whitford deeded the lot of land in question to plaintiff, and upon giving the deed went to the land and formally put plaintiff into possession.

Mrs. Wakefield Millet gave defendant leave to enter and cut hay on plaintiff's lot, and this action is brought to recover damage for trespass for cutting and removing grass from plaintiff's land.

The defence is leave and license from Mrs. Wakefield Millet, and evidence was given that Mrs. Millet had a deed of the lot given by one of plaintiff's predecessors in title subsequently to the deed which he had given to plaintiff's predecessor in title. I find that this second deed is waste paper and gives no title.

But the defence also set up a claim that Mrs. Millet had been in virtual occupation of the lot in dispute notwithstanding the plaintiff's superior title, and that plaintiff had not a sufficient possession or occupation of his lot to maintain trespass. The defendant's counsel contended that the writ of possession was void as against Mrs. Millet because the action of ejectment being against her husband, who had no title, could not affect her. As it was the husband who was claiming possession, even though under his wife, I decide that the writ of possession was effective against her as well as her husband.

I am satisfied by the evidence that plaintiff is not only the legal owner of the lot in dispute, but that he was put into lawful possession of it four or five years ago, and that

any acts of the Millets in respect of said land were simply trespasses. Mrs. Millet had no power to give to defendant a license to cut the hay on plaintiff's land, and he must be regarded as simply a trespasser.

I fix the damages at \$10 and give judgment for the plaintiff for this amount with costs.

NOVA SCOTIA.

LONGLEY, J.

OCTOBER 29TH, 1906.

MORASH v. GELDERT.

Assault—Trespass—Excess.

Action for assault tried before LONGLEY, J., at Bridgewater.

J. A. McLean, K.C., and C. L. Freeman, for plaintiff.

S. A. Chesley, and D. F. Matheson, for defendant.

LONGLEY, J.:—In this case I am not satisfied by the evidence that plaintiff was a trespasser on the land where the assault occurred. The most that can be said is that the ownership of the lane was in dispute, but plaintiff had been constantly using it for a long time.

Even if the plaintiff had been a trespasser I think defendant was guilty of excess. I accept the story of the assault given by plaintiff and Mrs. Richardson, and I find that the plaintiff is entitled to recover damages. I do not think his injuries were very great, nor occasioned him much loss. I fix them at \$10, and I give judgment for this sum with costs.

NOVA SCOTIA.

LONGLEY, J.

OCTOBER 29TH, 1906.

LANGILLE v. ERNST.

Ship—Collision—Damages—Loss of Fishing Voyage.

Action for damages for negligence tried before LONGLEY, J., at Bridgewater.

J. A. McLean, K.C., and C. L. Freeman, for plaintiff.

J. A. Roberts, for defendant.

LONGLEY, J.:—In this case the evidence satisfies me that the collision was due to the negligence of defendants. The evidence seems clear that plaintiff complied with all requirements on the part of a vessel of the class in question when lying at anchor in port at night.

The only question is one of damages. The defendants are liable for the cost of repairing the "Hero." From the bills proved definitely I can find that for these repairs there was paid: to Robertson, \$86.04; for labour (sworn between \$10 and \$15) \$12.50; freight \$50: — \$148.54.

It was shewn that some of the crew worked on the repairs, but as they were under articles and being paid, and especially as no evidence of the number of days' work was given, I am unable to award anything for this.

The claim for loss of fishing during the season is one which is so vague and remote that I feel I have no data upon which to fix any sum. It is quite probable that loss did result from the accident which laid the vessel up for twenty-six days, but how am I to judge of the extent of this? The "Hero" took back less fish than was expected at the beginning of the voyage—less than the average catch—but how am I to say that this was due solely to the detention? I think I can only adjudge the defendants to pay for the actual loss proved, which I fix at \$148.54.

NOVA SCOTIA.

LONGLEY, J.

OCTOBER 29TH, 1906.

JENNINGS v. CHANDLER.

Trespass—Title—Joint Occupancy—Deed by one Occupant with Other's Concurrence.

Action of trespass tried before LONGLEY, J., at Bridgewater.

J. A. McLean, K.C., and C. L. Freeman, for plaintiff.

V. J. Paton, for defendant.

LONGLEY, J.:—The piece of land in dispute consists of thirty acres at Mill Cove, Lunenburg county. It has no

house on it. For thirty-nine years the plaintiff has been making use of it, but his brother Joseph, who lived with him not far from the land, was joint occupant all the while. About thirty years ago a deed of this land¹ was given to Joseph Jennings, who has held the title continuously until he conveyed it by deed to Chandler some two years ago.

Upon the evidence I am satisfied that Joseph and Jacob (the plaintiff) were joint occupants of the land. It appears that many years ago when Shatford was wishing to flood a portion of the land he applied to Jacob for permission and Jacob told him he had the land leased from his brother Joseph for ten years, six of which had expired, and four had still to run, and he agreed for a certain consideration to allow the flooding for four years. It appears from the evidence that Jacob knew all these years that his brother had the title, and all his rights and interests in the land were through and from his brother.

I find that the plaintiff's title through adverse possession entirely failed.

Some two years ago Joseph Jennings was pressed by creditors and one had sued him. To get relieved of these he went to defendant Chandler and asked him to advance money to pay his debts and he said he would give him a deed of the piece of land in question. It was proved to my satisfaction that the plaintiff was present at these negotiations, sanctioned them and offered to join in the deed if it was necessary.

Chandler did advance the money and Joseph gave a deed. Jacob did not join in it but wanted money to do so.

After Chandler had obtained his deed from Joseph he went upon the land with a constable and took formal possession of it, and so notified the plaintiff who was present, and defendant drove a stake and fixed a portion of the fence.

Plaintiff continued to occupy and interfere with the land after this, and cut down what hay had grown upon it, and stacked it. The defendant went upon the land and removed the hay.

Plaintiff brings this action to recover damages for the removal of the hay. It was contended on the part of defendants that as the title was always in Joseph, and he was also joint occupant with Jacob, the deed and possession of Joseph was a sufficient ouster of Jacob to enable Chandler to exercise full authority over the land. But apart from

this I think Chandler made a legal entry after his deed and that after that any interference with the land by Jacob was a trespass. In my opinion plaintiff cannot recover in this case, and I give judgment for the defendant.

NOVA SCOTIA.

GRAHAM, E.J.

NOVEMBER 2ND, 1906.

MASSEY-HARRIS COMPANY v. ZWICKER.

Principal and Surety—Guaranty of Payment of Note—Note not Presented for Payment—Principal and Agent—Contract to Supply Goods to Agent—Proviso against Liability for Damages for Non-Delivery—Latter Clause Void as Repugnant—Waiver of Terms.

Action on a guaranty tried before GRAHAM, E.J.

W. M. Christie, K.C., for plaintiffs.

A. Roberts, for defendant.

GRAHAM, E.J.:—This is an action on a guaranty indorsed on a promissory note for \$65 made by one Charles Dorey to the plaintiffs payable at Mahone Bay; also on a similar guaranty on a note for \$25 made by Arthur Ernst payable at Mahone Bay; also on a promissory note for \$724.10 made by the defendant payable at St. John, N.B.

The form of the guaranty is: "For value received I guarantee the payment of the within note and hereby waive notice of non-payment thereof."

The first defence to the guaranty on the Dorey and Ernst notes is that there was no consideration for the making of the guaranty. I am of opinion that there was.

The plaintiffs sent to the defendant for sale on commission bicycles. It appears that he sold to Dorey and Ernst each a bicycle of the plaintiff company, and he was liable to the company for the amount payable by them. Later he obtained these notes from them and gave them to the company's agent for this indebtedness. The notes are on a printed blank form and the indorsement of guaranty is in print on the form. The defendant did not sign the guaranty

and the notes were returned by the company in three or four days for him to sign them, which he did. I think the contention is that because he did not sign them at first it was not part of the original transaction, and, therefore, that there is no consideration. I find that it was all one transaction taking the notes guaranteed in this way for the original liabilities, and until they were so guaranteed the defendant was not discharged of his original liability. Hence that there was a consideration for the guaranty. The taking of the note and the giving of time constituted the consideration.

Then it is contended that there has been laches on the part of the plaintiffs in looking to the parties for these amounts and calling on the defendant for them. After the notes were given in 1900 the defendant continued to be the plaintiffs' agent in that district for several years. The defendant was concerned in the payment of the notes. He did in fact take back from Dorey the machine sold to him and he demanded from Ernst the amount due from him and received it. The notes, as I said, were made in 1900. The company's manager, Mr. Tench, on the 10th of November, 1902, demanded payment from the defendant, and the defendant then discussed the matter of providing for payment and at his instance there was indulgence given. In the one case they went to see Dorey about his note, and in the other case he said that if it was not paid by a certain time he would pay it. I think there has been no laches and no prejudice if there was delay.

In respect to these two notes, and the note for \$724.10, there is a defence that the notes were not presented for payment at the places mentioned, namely, Mahone Bay, and in the case of the larger note, St. John. I find that the defendant, by promises to pay, and otherwise, waived the want of presentment in the case of the note for \$25 and the note for \$724.10. In the last case \$200 was paid on account of it and a blank note was signed by the defendant after it was due to be used as a renewal. I cannot find that there is any proof that the other note was presented at Mahone Bay in the way it could be presented under the Code, or that the want of presentment has been waived. The cases cited for the plaintiff, *Hitchcock v. Murphy*, 5 M. & G. 562, and others, were not cases of a note being payable at a particular town as this note was. To make out a case against the maker of a note payable at a particular place presentment must be alleged and

proved. And I think this must be so in the case of a guarantor of that note.

The defendant has a counterclaim. He had been for a number of years the company's agent at Mahone Bay to sell farming implements and machines. And apparently each year a contract in writing was made between the parties. The defendant says that there was such a contract for 1905, and that the plaintiffs committed a breach of it in not sending to him at his request implements and machinery, to enable him to fill the orders. At the trial the defendant applied for an amendment alleging in the alternative a renewal of the written contract for the year 1905. It appears that it was usual for duplicates of these contracts to be executed and exchanged. Now there is no evidence that the company ever executed a contract for the year 1905. Each party has made a search and neither can find any such agreement executed by either party. And it is quite evident that none was actually executed. But on December 19th, 1904, the plaintiffs sent a letter to defendant which contained this statement: "Our Mr. Schurman has advised us of a renewal with ourselves of your contract arrangement for 1905, and which we have pleasure in confirming, &c."

That, I think, is sufficient, and by the terms of the 1904 contract it would be continued until displaced by another. The defendant acted on the letter. On the 27th of May, 1905, the plaintiffs notified the defendant that they closed the agency at Mahone Bay, and to reship all goods to their Middleton warehouse, and if any goods had been sold since last settlement to have the settlement in at an early date.

By a clause in the contract for 1904 renewed by that letter, it was provided that the company could at any time and for any cause cancel the contract. This in my opinion was effected by the letter I have mentioned.

It is claimed, however, that before that cancellation the defendant had sent in orders for implements for customers which the plaintiffs failed to supply. And in the evidence there is proof that the defendant did send at least his own order for goods which were not sent to him. In this contract there is a peculiar provision:

"The company agrees to furnish goods to the agent . . . as follows, &c.:" Then, later, this appears: "(e) If from any cause the company fails to furnish the agent with these goods it shall not be liable to him for damage in consequence."

The clause has hardly been referred to in the argument of this case. I suppose the company must have been advised in respect to this contract and clause. However, I venture to think for the present that it is a void clause being repugnant to the obligation.

An attempt is made to oust the Court of jurisdiction. In Sheppard's Touchstone, 373, it is said: "When the condition of an obligation in the matter of it is repugnant to the obligation itself, there the condition is void and the obligation good; and, therefore, if the condition of an obligation be that the obligee shall not have benefit by the obligation or that he shall not at any time sue for the money in the obligation or the like, the condition is void and the obligation single."

I refer also to Horton v. Sayer, 4 H. & N. 643.

Then the plaintiffs rely on a further stipulation, namely, one to the effect that the agent agreed on making a sale to send promptly a signed order to the company for the implements. And it is contended that this means a signed order of the customer. And that the orders which were forwarded for the sales made before the cancellation were not orders signed by the customer. In my opinion, by the course of dealing between the parties during the agency, which extended over a number of years, that stipulation was waived and rescinded. The plaintiffs do not in the case of this agent give a single instance in which the customer's order was forwarded during the period of the agency. The agent's own communication was all that was required and it was always acted on.

It is proved that the defendant received orders from several customers and sent to the company for the machinery. This happened during the period before the cancellation.

In respect to this breach I think that the plaintiff lost profits on the transactions, and I assess his damages at the sum of \$30.

Another point has been raised, namely, that the defendant is entitled to compensation in respect to his services just before the cancellation of the contract which resulted in customers procuring the plaintiffs' articles after that time. I am not going to consider whether this contract admits of a construction which would enable such compensation to be given because the defendant's pleadings do not cover that case and the evidence does not convince me that there was any

subsequent purchase of the plaintiffs' articles which resulted from the defendant's previous efforts.

In respect to the alleged set-off I find for the plaintiffs.

The plaintiffs will, therefore, have judgment in the action for the amount of the note for \$25, and the note for \$724.10, with interest at six per cent. and the costs of the action except those which are incident to the Ernst note for \$65. As to the part of the action on that note it is dismissed and the defendant will have the costs incident thereto.

The defendant will have judgment on the counterclaim for the sum of \$30, and the costs of the counterclaim.

All to be set off.

NOVA SCOTIA.

TOWNSHEND, J.

MAY 2ND, 1906.

SMITH v. FRAME.

Promissory Note—Consideration—Note Given for Balance of Previous Judgment.

Action on a promissory note tried before TOWNSHEND, J.

A. Whitman, for plaintiff.

H. Mellish, K.C., and J. T. Ross, for defendant.

TOWNSHEND, J.:—This is an action on a promissory note the making of which is admitted, but it is contended that it was made without consideration, or, to put it in another way, the consideration for which it was given was illegal. The defendant under a judgment recovered against him in November, 1896, for \$1,721 and costs by the plaintiff, had been brought before an examiner under the Collection Act, and an order was made against him to pay \$10 per month. Under this order he paid in instalments \$1,000, and then refusing or neglecting to pay any more, was arrested under an execution on the judgment and committed to jail. Then, under the Indigent Debtors' Act he applied to Mr. Justice Meagher for his discharge. The matter was heard and at the suggestion of the Judge the parties came to an agreement between

themselves and the Judge signed an order for defendant's discharge from custody, stating that he did so owing to the parties coming to a settlement. The settlement made was the giving the note sued upon payable on demand and the defendant's release from imprisonment under the execution.

The defendant is an officer of the Dominion Inland Revenue Department, and the only income or means of payment he has is the salary he is in receipt of as such officer.

It is contended by the defence that the order of the examiner was illegal inasmuch as no legal process can attach or in any way interfere with the salary he receives as a Dominion official to enforce the payment of his debt. This is no doubt correct, but in my view does not help the defendant here, (1) because the order on its face does not profess to attach or affect such salary, and (2) in any case if the order was illegal he was bound to appeal from it within thirty days as fixed by statute. He did not do so, but has acquiesced in it for years and paid under it a large amount. It may have been an improper order to make under the evidence before him, but he had undoubted jurisdiction to make it. I do not think it can be questioned at this late date, even if it appeared that he was ordered to pay the money out of his salary which, as already stated, he was not. It is not necessary for me to deal further with that branch of the case nor the authorities on it.

I do not know that I quite appreciate the argument that there was no consideration for the making of the note. It is true that judgment had already been recovered for the same debt, which judgment was still in force, and on which there was admittedly due to plaintiff the amount for which the note was given. Is there any legal objection to the plaintiff taking a note for the amount or part of the amount of a judgment from the debtor, giving it may be extended time to the debtor? Will not the judgment debt due to the plaintiff form a valid and sufficient consideration? Will not the extension of time be a consideration? The extended time here might only be three days, but that would be as good as three months for this purpose. I am inclined to think there was a good and valid consideration for the note. It is beside the question to point out that plaintiff might sue the defendant over again as he is doing here, and have him again brought up before an examiner and ordered to pay monthly, and on failure to pay to go to jail a second time for the same debt. All

this may be an abuse of the procedure in collecting or attempting to collect the debt, but I cannot see that it affects the validity of the note. All such conduct on the part of the plaintiff might and probably would affect his right to costs, and might no doubt influence the examiner in exercising his discretion as to the order that should be made, or the Judge in case he is again incarcerated and applies for his discharge, but I cannot see that it can be considered in determining the issue of whether there was a good and valid consideration for the note.

The defence of duress was not argued, nor in my opinion was there any solid ground for saying that it was given under any such conditions.

In my opinion plaintiff is entitled to judgment for the amount of the note and costs.

NOVA SCOTIA.

GRAHAM, E.J.

NOVEMBER 2ND, 1906.

REX v. YOUNG.

Criminal Law—Inmate of Bawdy House—Form of Conviction—Imprisonment for Time Certain or until Released.

J. B. Kenny, for the applicant.

No one contra.

GRAHAM, E.J.:—Effie Maud Young has been convicted before a stipendiary magistrate for the city of Sydney "for that she on or about the 24th day of September, 1906, in the city of Sydney . . . was unlawfully an inmate of a disorderly house, to wit a common bawdy house or house for the resort of prostitutes."

By the warrant of commitment she was committed to the gaol for the "term of three months or until she shall be therein delivered by due course of law."

Sections 207 and 208 of the Code are in effect as follows: Everyone is a loose, idle or disorderly person or vagrant who (then follow a number of acts very different in character)

"(j) is a keeper or an inmate of a disorderly house, bawdy house or house of ill-fame or house for the resort of prostitutes."

Then comes the penalty:

"Every loose, idle, or disorderly person or vagrant is liable on summary conviction to a fine . . . or to imprisonment for any term not exceeding six months or to both."

It is contended that instead of stating in the conviction the specific act of vagrancy under (j) as was done in this case, it should have been stated in the conviction that she was "a loose, idle, or disorderly person or vagrant."

As is pointed out in the case quoted from, the manner suggested by the defendant's counsel would not be fair to the defendant. Those words might cover a charge for an offence of wilfully refusing to maintain himself or of tearing down door plates or of being a common prostitute. The mode adopted has the advantage of certainty. It also has the advantage of giving fair notice to a defendant of the charge against him.

I am of the opinion that the paragraph (j) with its context constitutes an offence, and that this conviction properly states a charge under it, using the generic term which is applied to cover all the various acts from (a) to (l) i.e., the name which, for convenience, is given to a person committing any of those acts. *R. v. Keeping*, 4 Can. Crim. Cas. 497, is cited, in which the conviction stated that the defendant "was the keeper of a disorderly house, that is to say, a common bawdy house, at, etc." The judgment discharging the defendant contains these words: "Section 207 (j) of the Code does not help the matter, as that sub-section creates no offence but only indicates one of the many ways how a person may be a 'loose, idle, or disorderly person or vagrant,' and that is the proper way to charge an offence under that section."

I think that the contention is at variance with the case of *R. v. McCormack*, 7 Can. Crim. Cas. 135, in which it was held by Hunter, C.J., "that a summary conviction for being a loose, idle person or a vagrant, without specifying in what the vagrancy consisted under s. 207 of the Code, is void for uncertainty." Hunter, C.J., said: "The conviction is clearly bad. You might as well charge the man generally with being a thief. The accused was entitled to know under what

sub-section of s. 207 he was charged, that is, what the facts were on which the prosecution relied."

I refer also to the remarks of Lord Alverstone, C.J., in *Smith v. Moody*, [1903] 1 K. B. 56. Also the forms under the English Vagrancy Act, 5 Burn's Justice of the Peace 1051; Stone's Justices Manual, Appendix, 1138, in which the specific act constituting the person a loose, idle or disorderly person is set forth.

It is also contended that the words in the conviction, "or until she shall be therein delivered by due course of law," vitiates it. But I think those words are to be read as a limitation on the provision fixing the term of three months. An unnecessary provision has been inserted for the case of an appeal and security being given or a quashing of the conviction before the three months' term has expired or some such contingency.

Those words have been held to vitiate a conviction where no term of imprisonment has been fixed. But here they seem to be unobjectionable.

The application to discharge the defendant will be dismissed.

NOVA SCOTIA.

GRAHAM, E.J.

NOVEMBER 2ND, 1906.

REX v. CLARK.

Canada Temperance Act—Imprisonment with Hard Labour in Default of Payment of Fine.

J. J. Power, for applicant.

J. L. Ralston, contra.

GRAHAM, E.J.:—The defendant has applied for his discharge upon habeas corpus proceedings because the commitment under the Canada Temperance Act provides for imprisonment with hard labour in default of payment of the penalty. He was detained under that commitment only as appears by the return as amended.

The Canada Temperance Act, 1904, c. 41, provides that a defendant on conviction "shall be liable to a penalty for the first offence of not less than fifty dollars or imprisonment not

exceeding one month with or without hard labour." It has been held that the imprisonment there mentioned is an alternative penalty of punishment, not an imprisonment in default of payment of the fine or of distress. See *R. v. Blank*, 10 Can. C. C. 358; *R. v. Horton*, 3 Can. C. C. 842. In case of imprisonment for such default, when can hard labour be imposed?

The amendment of 1900 to the Code, s. 872, provides that "whenever under such Act or law imprisonment with hard labour may be ordered or adjudged in the first instance as part of the punishment for the offence of the defendant, the imprisonment in default of distress or of payment may be with hard labour."

I think that this provision is applicable to statutes of this kind, namely, those imposing both punishment with hard labour and a penalty with imprisonment in default of payment or distress. See Code, ss. 208, 512, etc. In such a case it would be anomalous for the person serving for the whole penalty to be imprisoned part of the time with hard labour and part without.

That view will give an office to the words "as part of the punishment" in the provision I have cited. And that is not the case of this statute of 1904, c. 41.

The defendant must be discharged with the proviso that no action shall be brought in respect to his imprisonment.

NEW BRUNSWICK.

FULL COURT.

JUNE 15TH, 1906.

REX v. GREY.

Criminal Law — Conviction for Killing Dogs — Complaint Laid by Wife of Owner—Defendant Ordered to Pay Costs to Owner instead of to Prosecutrix—Amended Conviction Returned on Certiorari.

Motion to make absolute a rule nisi to quash conviction argued in Easter Term, 1906, before TUCK, C.J., HANINGTON, LANDRY, MCLEOD, and GREGORY, JJ.

J. H. Barry, K.C., for the applicant.

J. P. Byrne, contra.

The judgment of the Court was delivered by

TUCK, C.J.:—This was a conviction of the defendant William Grey, junior, for killing two dogs, "Lion" and

"Barney," the property of Joseph Chamberlain. The complaint is made by Vina Chamberlain, the wife of Joseph, and charges that the defendant "did unlawfully kill two dogs the property of Joseph Chamberlain called Barney and Lion."

At the trial the defendant pleaded "guilty;" and the magistrate entered convictions for two offences; and a return of this conviction, or rather two convictions, was made to the clerk of the peace.

The rule absolute for a certiorari and rule nisi to quash were granted on the following grounds:—(1) The convictions are bad in that they do not follow the minute of adjudication; and, (2) the information and summons being for a single offence, the justice was not warranted in entering up two convictions, and the convictions are bad.

In his return to the writ of certiorari, the justice, besides returning with the proceedings the two convictions first made, also certifies that the conviction thereto annexed marked "A" was an amended conviction made in obedience to the said writ of certiorari. The amended conviction is for only one offence, and adjudges said defendant "to forfeit and pay for killing the dog Barney the sum of five dollars together with twenty dollars, being the amount of injury done, and the sum of five dollars for the killing of the dog Lion together with twenty dollars, being the amount of injury done; and also to pay to the said Joseph Chamberlain the sum of ten dollars and sixty cents for his costs in this behalf to be paid forthwith." This amended conviction agrees with the minute of adjudication as made by the magistrate.

Two objections are made to this amended conviction. First, it is said that the magistrate had no power to amend the conviction; and, secondly, that the amended conviction is wrong, as it orders the costs to be paid to the owner of the dogs instead of the prosecutrix.

As to the first objection, it seems to me that the authorities are clear and go to shew that the justice could amend the conviction.

In *Selwood v. Mount*, 9 C. & P. 75, where "magistrates having convicted a party under the Highway Act, drew up a conviction and returned it to the clerk of the peace, and on an action being brought against them, put in the conviction returned to the clerk of the peace (which was open to some formal objections), and also another conviction drawn up

afterwards in a more formal shape," it was held "that there is no impropriety in this course of proceeding, provided the latter conviction is according to the truth and supported by the facts of the case."

In *Rex v. Barker*, 1 East 186, "the Court refused a criminal information against a magistrate, for returning to a writ of certiorari a conviction of a party in another and more formal shape than that in which it was first drawn up, and of which a copy had been delivered to the party convicted by the magistrate's clerk; the conviction returned being warranted by the facts." See the judgment of Lord Kenyon, C.J., in that case. Also see *Regina v. Turk*, 10 Q. B. 540, and *Charter v. Greame*, 13 Q. B. 216.

I think also that the other objection, that the costs were ordered to be paid to the owner of the dogs, instead of the prosecutrix his wife, is not tenable. If it was a mistake it was a natural one, for Joseph Chamberlain was the real prosecutor. But at all events, a case like this is provided for in ss. 883 and 889 of the Criminal Code, which enact that the judgment on appeal from a summary conviction shall be on the merits, and that the conviction shall not be held invalid for irregularity. Here the facts are only one way. Grey killed the dogs and was properly convicted, fined, and ordered to pay costs. No reason has been given why the conviction should not stand.

The rule nisi to quash must be discharged.

NEW BRUNSWICK.

FULL COURT.

JUNE 15TH, 1906.

MARTIN v. MARTIN.

Trespass — Line Fence — Occupation not in Accord with Paper Title.

Motion by plaintiff in an action of trespass to land tried before Landry, J., without a jury, to set aside the verdict for defendant and to enter a verdict for plaintiff, argued before TUCK, C.J., HANINGTON, LANDRY, McLEOD, and GREGORY, JJ., in Easter Term, 1906.

G. W. Allen, K.C., for plaintiff.

F. LaForest, for defendant.

The judgment of the Court was delivered by

TUCK, C.J.:—This case comes before the Court on a motion to set aside verdict for defendant and enter verdict for plaintiff, or for a new trial, on two grounds, that the verdict is against evidence and the weight of evidence, and against law.

It was tried before Mr. Justice Landry at Madawaska without a jury, when he ordered a verdict for the defendant. The suit is between two brothers, George Martin the plaintiff, and Peter Charles Martin the defendant, and is brought for trespass for entering a close and cutting and removing hay. Ostensibly it is brought for the purpose of settling the line between the lower part (held by the plaintiff), and the upper part (held by defendant), of lot 147, first tier, block one, parish of St. Leonards. The upper part of this lot was squatted on many years ago by Thomas Martin, the father of the plaintiff and defendant, and the lower part was also squatted on by a brother of Thomas Martin, and a line fence (a fence which is a most important factor in this case) was built between the parts so squatted on. After a time Thomas Martin acquired possession of the lower part, but this line fence was left up. The whole property was occupied by Thomas Martin and his sons. In 1879, by a family arrangement, grants were obtained from the Crown, the upper part to the defendant and the lower part to Robert Martin, another son of Thomas. This lower part was afterwards, by deed dated March, 1894, conveyed by Robert Martin and wife to plaintiff. The plaintiff claims that the full width given by the grant to Robert Martin went beyond this old fence and he had a line run and marked off where he believed was the division line between himself and his brother the defendant. The defendant, however, did not accept this new line, and went past it and cut hay down to this old fence, and carried the hay away, which are the trespasses complained of.

I shall not go through the whole evidence, but shall take the findings as to the facts from the judgment given on the trial by Mr. Justice Landry, than whom no Judge ever states facts more accurately. With his findings in this case I entirely agree.

He says: "I find that Thomas Martin, previous to the grants issuing, occupied and was in possession of the lot as now claimed by the defendant, and that a brother, or bro-

thers, of Thomas Martin occupied on the other side of the old fence. This old fence is existing upwards of thirty-five years, and was recognized then as the division line between the two lots, and was continued to be recognized till Thomas Martin obtained from his brothers their possession of the lower side of this fence. From that time to the issuing of the grants in 1879 the fences were kept as a division line between the lots, but the lots were in the occupation and possession of Thomas Martin for a time, and afterwards of Thomas Martin and the defendant. By an understanding among the family in 1879, two grants issued covering the whole piece, one to Robert Martin, and one to the defendant, giving Robert a width of six chains and the defendant a width of seven chains. It was then believed that such a division was marked by the old fence, and that while the occupation and possession after the issuing of the grants continued ostensibly as before, the defendant as grantee became in law, and in fact, in exclusive possession of the lot so granted to him. The grant in fact did not give him up to the fence to which he now claims, but he believing it did, and no one objecting, he adopted that old fence as the line of the grant, and lived up to it till July last, a period of over twenty-five years. This occupation was acquiesced in by Robert, the other grantee."

After making some other statements of facts as to Robert permitting the defendant to occupy the whole lot before he deeded to the plaintiff in 1894, and the nature of the occupation continuing the same until seven years ago the plaintiff went into exclusive possession of the lower part, the learned Judge continues: "Now under that state of facts, while I believe the fence as now claimed is not the correct line of the grant, yet I recognize that it has been the policy of the law of this province, and the decisions of our Court have been in that direction, not to disturb old established lines when sufficiently defined, and well recognized, and lived up to by interested parties for a period of twenty years and more, even if a strict adherence to the wording of the description in the grants and plans attached should point to a different line."

The learned Judge, therefore, ordered a verdict to be entered for the defendant. I agree with him, and a new trial must be refused.

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NOVA SCOTIA.

TOWNSHEND, J.

NOVEMBER 6TH, 1906.

DAVIDSON v. ARMSTRONG.

*Parliamentary Elections—Nova Scotia Election Act—Bribery
—Action for Penalty — Discretion of Judge as to Amount.*

Trial of action.

J. J. Ritchie, K.C., for plaintiff.

W. E. Roscoe, K.C., and O. T. Daniels, for defendant.

TOWNSHEND, J.:—This is an action for the penalty for violation of s. 91 of the Nova Scotia Election Act (R. S. 1900, c. 5), in which it is alleged that the defendant at an election of a member to serve in the House of Assembly in the month of March, 1906, did contrary to the provisions of the said Act by himself offer and promise money to a male person entitled to vote at such election. It is further claimed that the defendant be adjudged guilty of corrupt practices within the meaning of said Act, and that he shall be adjudged incapable during the period of five years next thereafter of being elected, and of sitting in the House of Assembly, and of being registered as a voter, and of voting at any election of a member to serve in the House of Assembly, and of holding any office at the nomination of the Lieutenant-Governor-in-Council of Nova Scotia, or any municipal office, or of being appointed or acting as a justice of the peace. The defence was simply a denial of

the acts complained of. On the cause coming on for trial, defendant withdrew his defence, and the only contention made on his behalf was that it did not follow that the whole penalty of \$400 should be inflicted; but that it was discretionary with the Judge to impose any amount not exceeding \$400. The plaintiff contends that even admitting such to be the meaning of the statute, there is no evidence to enable the Judge to exercise any discretion. The words of the statute are: "And every person so offending shall be liable to forfeit the sum of four hundred dollars to any person who sues for the same with costs." It is pointed out that in other sections dealing with penalties, such as s. 97, the language is different. In that section it reads: "shall in addition to any other punishment forfeit the sum of two hundred dollars," and there are other sections in which similar language is used, whereas in s. 91 the words "shall be liable to forfeit, &c." It is, however, to be observed in other sections, such as s. 89, another form of expression is used, "shall be liable to a penalty not exceeding one hundred dollars or to imprisonment for a term not exceeding three months or both." These words would seem to imply that to exercise discretion, the statute must expressly say so. I cite these passages to shew that not much help can be gained in interpreting the statute by regarding the whole Act. It is further pointed out that while various penalties are fixed they are always treated as the maximum, and the Judge exercises his discretion in giving a less punishment. In such cases, however, he generally has the evidence before him on which to exercise his judgment, and by a section of the Code it is expressly declared that the penalties affixed are the maximum which can be awarded, leaving the Judge free to use his judgment. I have deferred filing my decision in this and the other case tried before me to give defendants' counsel an opportunity to send me any authorities on the subject, or to present any further reasons why judgment should not be for the full amount. None have been sent, and I, therefore, conclude that nothing of any use can be found. As plaintiff's action is in the nature of an action for debt I do not see that I have any option in the matter, and I, therefore, find a verdict for plaintiff for the full amount, \$400, with costs.

NOVA SCOTIA.

TOWNSHEND, J.

NOVEMBER 6TH, 1906.

DAVIDSON v. HALL.

*Parliamentary Elections—Nova Scotia Election Act—Bribery
— Action for Penalty — Evidence of Status of Person
Bribed.*

Trial of action.

J. J. Ritchie, K.C., for plaintiff.

W. E. Roscoe, K.C., and O. T. Daniels, for defendant.

TOWNSHEND, J.:—This is an action for the penalty for violation of the Nova Scotia Election Act, in which it is alleged that in an election of members for the House of Assembly in March, 1906, the defendant offered by himself, and promised to pay a male person entitled to vote at such election money to vote at such election, and further offered to procure money for such male person in order to induce him to vote. It is further claimed that defendant be found guilty of corrupt practices within the meaning of the Nova Scotia Election Act, and that during the period of five years next after he be so found guilty, he be adjudged incapable of being elected and sitting in the House of Assembly, and of being registered as a voter, and of voting at an election of a member to serve in the House of Assembly, and of holding any office at the nomination of the Lieutenant-Governor-in-Council of Nova Scotia, or any municipal office, or of being appointed or acting as a justice of the peace. The only defence set up is a denial. Two witnesses were examined on the trial, John Taylor and Daly Saulnier, by whom it was proved that defendant had the day before the election approached them with the offer to procure for each of them five dollars if they would vote at such election for a particular candidate. The defendant although subpoenaed by the plaintiff did not attend the trial, and did not answer when called as a witness. No evidence was offered on behalf of defendant. It was urged on his behalf that there was no evidence that either Taylor or Saulnier were voters entitled to vote at the election, and

as the statute specifically requires this to be shewn, no doubt it would be fatal to the plaintiff if this has not been proved. In the case of Saulnier, I find no evidence whatever that he was a voter, and he swore that he did not vote at all at that election. As to Taylor the facts are somewhat different. He swore that he did vote, and among the circumstances attending his voting he admitted on the witness stand that he was required to take the oath generally known as the bribery oath. The question is whether this is sufficient proof of his being a male person entitled to vote at the election. With some hesitation I think it is, as unless his name was duly entered on the voting list, the returning officer could not have received his vote at all. The fact that his vote was received is, in my view, sufficient to establish his status as a voter. I, therefore, find the defendant guilty of corrupt practices within the meaning of the Nova Scotia Election Act as set forth in the statement of claim.

Mr. Roscoe for the defendant urged the same ground as in the case of Davidson v. Armstrong (ante p. 73), against inflicting on this defendant the whole penalty given by the statute. I have already stated my decision in Davidson v. Armstrong, that, in my opinion, I have no discretion to reduce, if I thought it right to do so, the amount fixed by the statute, \$400, for which I give judgment in the plaintiff's favour with costs.

NOVA SCOTIA.

TOWNSHEND, J.

NOVEMBER 6TH, 1906.

MESSENGER v. HICKS.

Arbitration and Award—Action to Enforce Award—Uncertainty.

Trial of action.

F. L. Milner, for plaintiff.

J. J. Ritchie, K.C., for defendant.

TOWNSHEND, J.:—This is an action on an award and the only substantial defence set up is that it is uncertain

on its face, and, therefore, cannot be enforced by action. It is contended that on the face of the submission and award the arbitrators did not decide all things referred to them. The submission recites that: "Whereas differences and disputes have arisen between the said parties in respect to the location of the division line between the properties of the said parties," and that one of them had brought an action of ejectment to recover possession of the land in dispute and the other an action of trespass, which actions were then pending, the parties all agreed to submit all questions in dispute including the disposition of the costs to arbitration. By the award the arbitrators designate exactly where the location of the division line is to be fixed, and appoint one of their number to see that it is so located. They further deal explicitly with the costs. It is not open to me to go behind the submission, and consider the matters which were to be considered. I find no uncertainty in the terms of the award, and think the arbitrators have fully dealt with all matters submitted, and, therefore, give judgment for the plaintiff for the amount claimed, \$312.37, with costs.

NOVA SCOTIA.

TOWNSHEND, J.

NOVEMBER 7TH, 1906.

FORREST v. SUTHERLAND.

*Trust—Assignments by Beneficiary — Priorities — Notice—
Agent's Knowledge of Prior Assignment—Costs.*

Action to determine the priority of claims against a fund of which plaintiff was trustee.

H. McInnes, for plaintiff.

J. A. McDonald, for defendant Gregg.

W. B. A. Ritchie, K.C., for defendants Williams et al.

J. J. Ritchie, K.C., for defendants Sutherland et al.

TOWNSHEND, J.:—The plaintiff is trustee of a fund amounting to \$6,099., left by the late John P. Mott for the benefit of Elizabeth Mott Sutherland. By the terms of the

trust deed the principal sum was to be invested, and kept invested, and the annual income was to be paid to her semi-annually, and at her death the principal was to be paid to any person she should appoint in her last will, and in default of any will to her children, and if she had no children, to any husband surviving her, and if neither, then to her brother and sisters, and children of any deceased brother or sister. The plaintiff paid her up to within two years or over the annual income amounting to about \$300. About that time he received notice of the appointment of a receiver at the instance of one of the defendant claimants, and since that time the income has been accumulating in his hands, in order, as he states, to ascertain the proper parties to whom payment was to be made. The beneficiary Elizabeth Mott Sutherland resided in Australia, and her sisters and brothers defendants also resided there. On the 21st of December, 1900, she borrowed from her sisters Jane, Irene, and Constance Sutherland, defendants, £125, to secure which she mortgaged her interest in the fund to them, and the sisters allege that she has only repaid £50. This is disputed and the brother Victor has testified that it has all been repaid except £8 13 9. On consideration of the conflicting evidence I find that only £50 has been repaid, and that the balance is still due to these sisters defendants. I do not place much reliance upon the evidence of the brother in this respect, especially as he endeavours to mix it up with other transactions of which not a very clear account has been given. On the 19th February, 1901, plaintiff says he received notice of this assignment, the first in point of date. The beneficiary, Elizabeth Mott Sutherland, on the 20th June, 1898, had made a previous assignment of the same fund to the defendant Gregg, but notice of this assignment was not received by the plaintiff until the 27th May, 1902, after the notice of the assignment to the sisters. The chief contest is, therefore, between these two claimants as to which is entitled to priority. The defendant Gregg maintains that although the Sutherlands were prior in point of time, yet they took the subsequent assignment with knowledge that he held a prior one. This is a matter of fact on which the evidence is somewhat unsatisfactory. The sister Jane whose examination was taken *de bene esse* swears that "neither I nor my sisters had notice of loans of any other persons at the time." The brother Victor Ernest, who was examined under com-

mission, was asked: "Did you arrange a loan from your sisters Jane, Constance, and Irene to Elizabeth? Yes, I arranged that. At the time you arranged that loan did you know of any other security which Elizabeth Mott Sutherland had at that time given? I only knew of a security given to Mr. A. W. S. Gregg." On cross-examination by Mr. Petrie he is asked: "You heard Mr. Wilson's explanation as to the knowledge of the Misses Sutherland as to his claim. What do you say as to that? I say that they had no notice of any claim at all. I executed all their business exclusively as their agent." Now if Victor was their agent in this business as he swears he was, and there is no contradiction of that statement, then I think his knowledge must be imputed to and bind them. I adopt the view that he was acting as agent for all the sisters in this and other matters as very probable in view of their relationship and the situation of all the parties. It is quite possible the sisters had no direct knowledge of Gregg's assignment, but when they trusted to an agent to make the loan, and arrange its terms, I think they must be bound by all he knows and does within the scope of his authority. My finding, therefore, on this point is that the sisters Sutherland were affected with knowledge of Gregg's prior assignment at the time they took their assignment, and that Gregg is entitled to be paid the amount due to him out of the amount first. The defendant's sisters, Jane, Irene, and Constance, will rank next, the defendants, Williams, Wilson, and Stanton, third. As to defendant Victor Ernest it was conceded at the argument that he had no claim on the fund, and he will, therefore, be dismissed from the action without costs. For the plaintiff costs have been claimed as between solicitor and client. Our court has so far not allowed such costs. My own practice has invariably been against allowing them, and I see no reason for a change in this case. The plaintiff will, therefore, have the general costs of the action and trial. Costs are claimed by each of the solicitors representing claimants in separate interests as they have been brought into court by plaintiff. On consideration I think these should be allowed out of the fund except that the solicitors for Gregg only shall tax any costs in respect to the commission to Australia. It is questionable whether the defendants Sutherlands should not be ordered to pay all such costs, having failed in the contention for which this commission was granted. I have been asked to direct that all

solicitors' costs shall be a first charge on the fund. This I decline to do except as regards plaintiff's solicitor, who shall be first paid. As to the others they will be added to the amount found to be due the respective claimants, and paid in the order already specified. Further directions reserved.

NOVA SCOTIA.

RUSSELL, J.

NOVEMBER 6TH, 1906.

REX v. MURRAY.

Justice of the Peace — Stipendiary Magistrate — Appointment of Town Clerk as Magistrate—Incompatible Offices—Automatic Vacation of One—Canada Temperance Act—Prosecutor Related to Magistrate—Constitutionality of Nova Scotia Act Preventing Disqualification on this Ground—Keeping Liquor for Sale—Previous Conviction for Same Offence on Previous Day—Continuing Offence—Evidence of Liquor being the Same—Magistrate's Refusal to Give Evidence.

Application for writ of prohibition to magistrate to restrain him from trying an offence under the Canada Temperance Act, and in the alternative for a writ of certiorari.

G. S. Harrington, for the application.

D. Cameron, contra. .

RUSSELL, J.:—A writ of prohibition is applied for in this case on the ground that the offices of town clerk and stipendiary magistrate are incompatible, and the town clerk could not therefore be appointed stipendiary magistrate. I find it unnecessary to decide whether the offices are incompatible or not, but I wish to guard myself from being understood as holding that the two offices may be held by the same person. If they are incompatible the consequence that follows is not that the stipendiary magistrate's appointment is void, but that the acceptance of office as stipendiary magistrate is an implied resignation of the office of town clerk. "The principle applies not only where the second office is the superior and more important one, but also

where it is not:" Dillon on Municipal Corporations, s. 255. There are cases, it is true, where the acceptance of an office incompatible with the one already held does not vacate the office first held. In such cases the fact of holding the office to which the incumbent is first elected or appointed may render him ineligible for the second; and this is the contention of the applicant in the present case. But I think the contention is answered in the distinction drawn by Parke, J., in *Rex v. Patteson*, 4 B. & Ad. 9; 38 R. R. 191: "Upon principle, not conflicting with any of the authorities, it seems that an officer cannot avoid his office by accepting another, unless his office be such as he could determine by his own act simply, or unless that authority concurs in the next appointment which could accept the surrender of or remove from the old one."

The office of town clerk is held during good behaviour: R. S. 1900 c. 71, s. 111, but "every person appointed to a corporate office other than a stipendiary magistrate may at any time by writing signed by him and delivered to the town clerk resign office on payment of the penalty (if any) provided for non-acceptance thereof, whereupon the office shall be vacant." There is no penalty provided for non-acceptance of the office of town clerk and the only difficulty, therefore, is the one suggested by the requirement that the resignation should be delivered to the town clerk. I think this difficulty is a mere matter of form, and that it could not have been intended that there should be no way in which a town clerk could resign his office. I have little doubt that a letter from the town clerk addressed to the mayor and council and delivered at the town clerk's office would be an effectual resignation of the office. The case therefore seems to me to come within the doctrine that where the office first held is one which the incumbent could determine by his own act, his subsequent acceptance of an incompatible office vacates the office first held. The writ of prohibition will therefore be refused.

The defendant asks for a certiorari on this ground and also on other grounds, one of which is that the stipendiary magistrate was second cousin to the prosecutor, who was the license inspector acting in his official capacity. The Towns Incorporation Act, R. S. 1900 c. 71, s. 117, provides that "no stipendiary magistrate of any incorporated town shall be disqualified from trying any cause or matter for any of

the following reasons. . . . (c): That the prosecutor . . . is related to such stipendiary magistrate . . . provided that such prosecutor . . . is acting in a public or official capacity." This provision exactly fits the present case if it is applicable to such a prosecution. But the defendant contends that it can only apply to prosecutions for offences which may be the subject of provincial legislation, and cannot be applicable to prosecutions under the Canada Temperance Act. If it is a statute relating to the procedure in a criminal case of course the defendant's contention is correct. If it relates to the constitution of the court to which the trial of such cases has been committed, the defendant's contention would seem to be unfounded. I can find no light by which to determine this question in Mr. Clement's latest edition, or in any of the cases with which I happen to be familiar, and no authorities were cited which afford me any help. I will not, therefore, hazard an opinion which would be as likely as not be misleading, especially as I find that I can dispose of the defendant's objection to the jurisdiction of the magistrate without deciding the constitutional question. The case of *R. v. Major*, 29 N. S. R. 373, contains a full and clear discussion of the doctrine of *propter affectum* as applied to judges and magistrates, and seems to show that, as applied to such functionaries, there is really no such doctrine, or at least none that is clearly established or defined. The dearth of cases on the subject is referred to and commented upon, and the learned Judge, after citing the authorities, concludes that "it would seem from these cases that no degree of consanguinity or affinity between the judge and any of the parties to a suit would of itself prevent a judge from hearing the case or render his judgment void, because favour would not be presumed in a judge." A decision to the contrary is cited in which a conviction was set aside because one of the committing justices was the father of the complainant; and dicta of English Judges are also mentioned. But Ritchie, J., in the case of *R. v. Major* (*supra*), refused a certiorari sought on the ground that the prosecutor's wife was sister to the wife of the magistrate. On the authority of this case I cannot hesitate to hold, even without the help of the Nova Scotia statute, that it can be no objection to the conviction that the stipendiary magistrate is the second cousin of the license inspector, who is the informant.

The next ground on which the certiorari is sought is that the magistrate refused to be sworn, and the defendant was prevented from proving a previous conviction for the same offence. The answer to this is that the counsel for the prosecutor offered to admit the previous conviction and produced a minute of it. The conviction, which the defendant thus sought to prove, was a conviction on August 30th, for keeping liquor for sale on August 14th, while the conviction as to which the certiorari is now sought, was a conviction made on October 2nd for keeping liquor on September 17th. The defendant contends that if the liquor was the same in both cases it was one continuing offence, and, indeed, he goes further and argues that unless there was an interruption of the business between the first conviction and the second, the latter would be bad, even if additional liquor had in the meantime been placed in the defendant's premises. The defendant's point, therefore, is that if he had been allowed to examine the magistrate he would have been able to show that the liquor kept on both occasions was the same. I cannot see, however, why he needed the magistrate's evidence for that purpose. The date of the two convictions having been admitted, and the dates of the keeping for which the convictions were made, appearing in the minute of the first conviction, and in the information or evidence in the second case, all the facts necessary to establish the defendant's point were peculiarly within his own knowledge and could have been proved by him, assuming that they would have established a defence if so proved. As to that, I need say nothing.

NOVA SCOTIA.

MEAGHER, J.

NOVEMBER 8TH, 1906.

KENNEDY v. McDONALD.

Bond—Condition for Payment of Instalments to Oblige for Life and after His Decease as He Might Direct—No Direction by Oblige.

H. Mellish, K.C., for plaintiff.

W. B. A. Ritchie, K.C., for defendant.

MEAGHER, J.:—The jury found the issues (including one as to alteration) in the plaintiff's favour and I am asked for judgment thereon which I award.

The bond sued on was in the penal sum of \$3,000, and was in the usual form to the deceased, his executors, administrators, &c., but in the condition to which the bond was subject the annual payments for 15 years of \$100 were expressed to be made to the obligee during his life and from his decease to the heirs, executors and assigns of the deceased as he might direct. The action is framed upon the condition.

It was conceded that if the plaintiffs had sued on the bond apart from the condition, they, under the findings, would be entitled to judgment. It was contended that the deceased had not by his will directed to whom the payments after his decease should be made; that its provisions related only to the use of the payments or their investment, and did not give any right of action; and that the will was not such an appointment as gave the executors the right to sue.

I must of course regard the bond as a whole and so regarding it it seems to me the plaintiffs' right is reasonably clear. Even if I thought this was doubtful I should award judgment on the findings and leave the defendant to his remedy.

The bond was drawn by a layman who deemed it necessary to provide in the condition first for payments to deceased in his lifetime, and also for those after his death, but that I think should not be permitted to control the absolute terms of the bond part. I regard the claim as an eminently just one which should not be allowed to be defeated or delayed by a mere technicality such as this, and which would be defeated by an amendment and the addition of a claim for the penalty.

I do not see any reason for refusing the plaintiffs judgment, which they will have accordingly with costs.

NOVA SCOTIA.

TOWNSHEND, J.

NOVEMBER 8TH, 1906.

THOMPSON v. CORBIN.

Sale of Goods—Machinery — Breach of Warranty — Damages — Loss of Profits — Wages Paid while waiting for Machinery.

Trial of action.

W. B. A. Ritchie, K.C., and T. R. Robertson, for plaintiffs.

W. F. O'Connor, and T. J. N. Meagher, for defendant.

TOWNSHEND, J.:—This action is for the price of a boiler and engine sold to defendant for \$400. No defence has been made to the claim for which plaintiffs are entitled to judgment. A counterclaim has been set up in which defendant claims damages for plaintiffs' breach of contract in respect to the condition of the engine at the time he received it. On the 22nd day of October, 1905, plaintiffs accepted the written offer of defendant in which he says: "You must guarantee everything in running order," to which they replied: "It being understood that the boiler is to stand a pressure of 120 lbs., and engine is to be in running order, and other gear in its present condition, but practically everything complete." The mill was delivered and set up by defendant at Grover's siding, where he intended to make laths, on or about the 16th of November, when it was found, according to defendant's evidence, "that she would not work when she was set up. We could not get up any steam, none whatever, I found all this wrong on the 16th November." On the 28th November, defendant saw plaintiff Musgrave (with whom he had conducted all negotiations) and told him the engine was not in working order, and notified him that he would have to get her repaired immediately. At that interview defendant offered if plaintiff would take \$250, that is to say, deduct \$150 from the price, he would do the repairs himself, and I infer clearly from the evidence, although defendant does not say so, that he would make no other claim for damages. He further says he told him he "had already lost \$100 on the transaction, and that he would hold him under a penalty of \$10 a day for every day the mill was idle." The plaintiff denies that any such notice was given to him. Musgrave said he would consult the other owners, and let them know, and in the meantime told him to get a machinist from Moirs to go up and examine the engine to find out what was wrong. After consulting his co-owners, Musgrave informed defendant that they would have it repaired. The machinist reported the engine out of order and that it needed such repairs as would make it necessary to take it to the machine shop. Musgrave swears that at this same interview defendant informed him that he had got an engine from Crease which he would use in the meantime, and that there

was no hurry about it. Late on December 6th, defendant informed him that the Crease engine was no good and that he must have the engine repaired at once, and defendant swears that Musgrave told him it would be done in two or three days. Plaintiffs then employed the Truro Foundry to do the work. That company found it necessary to remove the engine to their shop in Truro, and it was not fitted up ready for work until the 16th of January. The defendant claims damages for his loss of the use of the mill from about 16th November until 16th of January, about two months. It is in evidence that defendant had then on hand several profitable contracts which in consequence he was unable to fill at that time, although he did later on, and met no particular loss in that respect. But it further proved that there was a large and profitable demand for laths during this period, the benefit of which defendant entirely lost. It is further proved that defendant had a number of workmen on the ground for the purpose of carrying on the business, and for nearly all this period these men—nine in connection with the mill—were kept idle and that he had a boarding house in operation on the spot where he had to provide for these men. It is also, I think, satisfactorily shewn by defendant that he did all he could to give these men other work so as to reduce the loss occasioned by the condition of the engine. For the money paid these men for wages defendant also claims to be reimbursed, and to the contention that he should have discharged them defendant answers that it would not have been prudent to do so, owing to the expectation he had through plaintiffs that the engine would be able to work in a few days and also the difficulty of procuring a crew of men, once he allowed those engaged to go. I have no difficulty in finding that the plaintiffs did not fulfil their guarantee by delivering to defendant an engine in running order, and further that defendant suffered much damage and loss of business in consequence of their breach of contract. The principal defence of the counterclaim was that admitting the breach, there was accord and satisfaction. It is contended that when plaintiffs agreed to have the engine repaired, and did so have it repaired, defendant accepted this act in full satisfaction for all claims he might have against them. Defendant, if his evidence is to be accepted, emphatically denies this and further alleges that he notified them of the dam-

age he had suffered, and the amount he would look for, for every day's delay. But without relying on this evidence I think there is no reasonable ground for holding that defendant in any way waived any claim for damages suffered then, or that he might afterwards suffer. It seems to me a most unreasonable inference to draw from the transactions between the parties that defendant was willing to suffer serious loss without consideration whatever, especially when plaintiffs knew and defendant knew that under their contract they were bound to repair the engine so as to be in running order when he got it. My only difficulty is to determine the proper measure of damages. Plaintiffs' counsel contends that if damages should be awarded they should not exceed \$150, that is to say \$75 per month, as that amount would, under the evidence, cover the expense of hiring another engine. In order to affect the question of costs it has been proved that plaintiffs on June 13th, 1906, after the pleadings had been closed, formally offered to deduct \$150 from the amount sued for if defendant would accept same in full of all claims and demands under the counterclaim. Mr. Ritchie has referred me to the case of *Bruhm v. Ford*, 33 N. S. R. 323, as laying down the correct rule as to damages in such cases as that now under consideration. I refer to the authorities there cited as indicating the principles which govern my decision here, and I think defendant is entitled first to receive damages for the loss of the use of the mill, which under the evidence I assess at \$150. Whether he is entitled to other damages arising out of the special circumstances remains to be considered. In vol. 4 p. 97 of *Encyc. Laws of England* the general result of the existing law on the subject is summarized. Under paragraph 2 sub-sec. 3 is the following statement: "Any damage which is the probable result of the defendant's act, Provided that wherever the probability of such a result arising depends upon the special circumstances of the particular case, the defendant will not be liable to compensate the plaintiff for such result, unless he had notice of such special circumstances at the time of his making the contract," etc.

Now it is plain that Musgrave knew the purpose for which defendant was purchasing the engine and that he was prepared to saw laths once he got the engine there in good working order, and that he was aware the price of laths was

going up; indeed he offered him higher prices than those already contracted for by defendant with other parties. As conversant with mills and lumber he must have known that to operate such a mill a crew of men was necessary to be on hand as soon as the mill was ready. When the engine was found out of repair the natural result was that these men were idle, and in view of the promises to have it in running order in a few days it would not have been a reasonable thing to expect defendant to discharge all his hands with the difficulty before him of re-engaging them or others when the mill was ready. Moreover, defendant, in my opinion, did all that was reasonable to reduce the amount of damages resulting from plaintiffs' breach of contract. The defendant has not claimed for wages for all the days lost, but only when he paid out money, and for the time lost between Christmas and 16th January he makes no charge. He also was obliged to board the men in order to keep them in a place where board could not otherwise be obtained. I think his action in respect to holding the men, paying the wages, and doing what he could to reduce the loss, was fair and reasonable, and that he is entitled to recover as part of the damages the amount charged for same in the particulars, that is to say, \$195.35 for wages, and \$56.76 for board, also \$6 paid for steam gauge and packing, \$13.50 for new injector, \$4 paid Moirs' man, 50c freight on governors and \$1 truckage on steam chest, making in all \$427.11, and for that amount defendant will have judgment on his counterclaim with costs and costs of trial. Plaintiffs to have costs of action up to date of pleading counterclaim.

NOVA SCOTIA.

TOWNSHEND, J.

NOVEMBER 10TH, 1906.

REX v. BERRIGAN.

Fisheries—Unlawful Canning of Lobsters — Imprisonment in Default of Payment of Fine — No Prior Distress — Costs of Conveyance to Gaol — Evidence of Unreasonableness of Amount.

Motion for discharge.

Adam A. Mackay, for the prisoner.

No one contra.

TOWNSHEND, J.:—This is an application under the Liberty of Subjects Act for the discharge of the defendant from custody. He was convicted of unlawfully canning or curing lobsters without license in contravention of the Fisheries Act, and fined \$20 and \$10.35 costs, and adjudged in default of payment forthwith to be imprisoned in the common gaol for thirty days. It is contended that his imprisonment is illegal on two grounds: 1st, that before a warrant for his imprisonment could issue and be executed, a warrant of distress must be issued and returned. The amended Fisheries Act, c. 39, s. 3, sub-s. 18, is relied on. "Except as herein otherwise provided every one who violates any provision of this Act, or of the regulations under it, shall be liable to a penalty not exceeding \$100, and costs, and in default of payment, to imprisonment for a term not exceeding three months, and any fishery officer or justice of the peace may grant a warrant of distress for the amount of penalty and costs." Under this last clause it is argued that a distress warrant must first issue. It is conceded that the whole procedure in collecting fines under the Fisheries Act is to be taken under the Summary Jurisdiction Act, s. 872, and it is not a necessary preliminary under the latter Act in enforcing penalties that a warrant of distress should first issue. In my view the clause in question is simply superfluous, and was not put there with the object of changing the ordinary procedure. I have been referred to *R. v. MacFarlane*, 24 N. S. R. 54, but it will be observed that the decision in that case is based on the particular provisions of the Canada Temperance Act and amendments.

In my opinion it was quite competent for the magistrate to issue a warrant for imprisonment in the first instance, and that it is not imperative to read the word "may" as "must."

The second ground taken is that the sum put in the warrant, \$25, for costs and charges of carrying the defendant to gaol, is extreme and excessive. It certainly looks large, but I do not think myself justified in discharging the defendant on that ground. I can only know it is excessive by affidavits, which on such an application as this I am not at liberty to hear. The defendant has his remedy by action if excessive fees have been charged. The question

in R. v. Swan referred to was a different matter. Affidavits were allowed in support of a conviction to shew that the law had been complied with, although not set out in the conviction. Under the circumstances I refuse the discharge.

NOVA SCOTIA.

TOWNSHEND, J.

NOVEMBER 12TH, 1906.

GARDNER v. SIMPSON.

Distress — Nonpayment of Bailiff's Expenses — Excessive Distress to Realize Them—Collusive Sale—Depriving of Costs.

Trial of action.

F. W. Hanright, and J. A. Knight, for plaintiff.

H. Mellish, K.C., for defendant.

TOWNSHEND, J.:—I find much reason to be dissatisfied with the conduct of both parties to this action. The plaintiff to evade or delay the payment of a small school rate, \$1.28, exposed himself to all the loss he suffered, and did not after his horse was seized under the warrant make any offer to pay the legal expenses—indeed never asked what they amounted to. The defendant was, therefore, legally justified in proceeding with the sale although the expenses were very trifling. On the other hand defendant's conduct was very reprehensible in not, after the seizure and after he was aware the rate had been paid to the secretary, informing the plaintiff of the amount still due for expenses; and again in claiming as he did or deducting from the proceeds much more than in law he was entitled to. The levy in one view was in my opinion excessive. Defendant denies that he saw any other property of plaintiff in the barn on which he could levy, but he does not seem to have made any real enquiry on the subject, but seized and sold defendant's horse, worth at least \$60, for the small rate due. The worst feature of defendant's conduct, however, was in selling the horse at such a great sacrifice, \$15, and in immediately after the sale buying the horse from the purchaser at the small advance of

50c. Under the evidence I am bound to believe he did not hear Urquhart's last bid for \$20, but the whole transaction has the appearance of collusion, although denied by both defendant and purchaser. The defendant subsequently sold the horse for \$55, thus making a large profit over what was due for the rate and expenses. As I stated at the trial, his conduct in buying the horse under the circumstances was most reprehensible, and on the ground of excessive distress I give judgment for plaintiff for all he received for the horse over and above the rate and lawful expenses, which I fix at \$44.96. Judgment for this amount with costs. My reasons for depriving plaintiff of his costs are set forth in my decision.

NOVA SCOTIA.

GRAHAM, E.J.

NOVEMBER 12TH, 1906.

WHITE v. ALLEN.

Vendor and Purchaser—Sale of Timber—Prior Unregistered Deed—Notice.

Trial of action.

W. M. Christie, K.C., for plaintiff.

J. B. Kenny, for defendant.

GRAHAM, E.J.:—William Dodge in order to secure the support of himself and his wife in their old age entered into a contract for that purpose with the defendant Allen. Allen was to live on Dodge's farm in order to carry out the contract. Dodge was to make a deed of the farm to Allen and deliver it to Harvey, the justice of the peace who was to prepare it, to be delivered by him to Allen, on the death of Dodge, unless in the meantime both of the parties or one with the consent of the other called for it. Harvey prepared the deed; it was executed by the Dodges; formally handed to Allen; to be handed back immediately to Harvey; and has since been kept by him. The justice made a memo, at the time or shortly afterwards to this effect: "Memorandum of deed made by William Dodge to Eber A. Allen May 2nd, 1898, placed in my hands to be kept by me

until the death of William Dodge, unless called for by both of the parties mentioned together, or by one with an order from the other authorizing me to deliver the same to him." The deed was never registered of course. Allen went into possession along with the Dodges and has been there since. On November 14th, 1902, by an instrument, and later, namely on 29th November, 1902, by an instrument more formal than the other, Dodge leased to the plaintiff for ten years the timber of a certain size on the land for the sum of \$300, \$10 having been paid on account. And the plaintiff has brought against the defendant Allen and his servants this action for cutting on the land. Two questions were raised. First, whether this deed was only an escrow, and, secondly, whether the want of registry of the deed does not let in the lease. It is not I think very material whether the deed was an escrow or not. Even if it were only delivered in escrow there was a good contract between Allen and Dodge, of which plaintiff had notice and which would be enforced equitably against plaintiff and defeat this action. But it has been decided on much the same facts in the case of *Allen v. Dodge* (unreported), a decision which I follow, that it was, in fact, delivered. The parties acted as if there was a formal delivery of the deed at the time and as if it were deposited with Harvey as security for the performance of the agreement to support.

Then as to the question of the registry law, or rather of notice of the deed: By the time the lease was given Allen had been doing something for the support of the Dodges for a period of four years or upwards. Then I find that the plaintiff had notice of the deed having been given by Dodge before he took his lease. There are cases where knowledge of the agent is knowledge of the principal. And I find that the plaintiff had two agents concerned about the acquisition of the land by him who had notice of the existence of this deed, namely, one Knowles and the plaintiff's son White. They made the negotiations with Dodge for the land, and it is proved that before the execution of either instrument they were warned of the existence of this deed and could not buy the timber. I accept the testimony of Mrs. Allen and of Joseph Dimock as to this fact, and Frederick Knowles practically admits it. I find that the lease was taken with notice of the previous deed. The defendants will have judgment with costs.

NEW BRUNSWICK.

BARKER, J.

NOVEMBER 16TH, 1906.

**EASTERN TRUST COMPANY v. CUSHING SULPHITE
COMPANY.**

Company—Bonds—Coupons—Sale of Assets—Rate of Interest — Mortgage to Secure Bond Issue — Acceleration Clause.

Powell, K.C., for plaintiffs.

The Attorney-General of New Brunswick (Pugsley, K. C.), for George S. Cushing, a bondholder.

Hazen, K.C., for liquidators.

BARKER, J.:—The question involved in this application is whether the bondholders are entitled to be paid out of the proceeds of the sale of the mortgaged premises interest at the rate of ten per cent. as fixed by the statute. The mortgage in question, which is dated June 25th, 1901, was given by the defendants to secure an issue of their bonds amounting to \$280,000 with interest at the rate of ten per cent. per annum, payable every six months, according to the coupons attached. The company by the terms of these bonds, which are dated July 1st, 1902, undertook to pay the principal in ten years, and “to pay in the meantime interest thereon at the rate of ten per cent. per annum, half yearly on the first days of January and July in each year, upon presentation of the annexed coupons as they shall respectively become due, and to make such payments at the Bank of New Brunswick, St. John.”

The coupons are in the following form: “The Cushing Sulphite Company Limited will pay the bearer hereof at the Bank of New Brunswick, St. John, New Brunswick, Canada, dollars on the day of A.D., being six months interest on their debenture No. .”

The defendants are a corporation created under the Joint Stock Companies Act of New Brunswick, having their chief place of business in the parish of Lancaster, in the city and county of St. John, where their mill and property com-

prised in the mortgage are situated. The proviso for payment in the mortgage is as follows: "Provided always that if the said party hereto of the first part shall well and truly pay or cause to be paid the interest on the said bonds when such interest shall become due and shall also pay the principal amount of each of the said bonds to the holder thereof, when such amount shall become due and payable, and shall pay, satisfy and discharge the whole of the said sum of \$280,000, and all interest thereon by payment of all the said bonds as aforesaid, and shall well and truly also keep do and perform all other the covenants, conditions and agreements herein contained on the part of the said party hereto of the first part, to be kept done and performed, then this indenture and every matter and thing herein contained shall cease and be void." Then follows a covenant by the defendants with the plaintiffs—the trustees under the mortgage for the bondholders—to pay the bonds to the holders or owners thereof when and as the same shall respectively become due and payable together with all interest thereon when due, as set forth in the proviso. The mortgage also contains covenants for insurance and for the payment of taxes and other charges liable to become a lien on the property, and it provides that in case default should be made in payment of the principal money or interest due or agreed to be paid under or upon the bonds aforesaid or any or either of them, or if default should be made by the defendants in payment of the insurance premiums or any other of the amounts therein agreed to be paid by the company, and such default should continue for ten days, the plaintiffs as such trustees might at any time after the expiration of ten days from the time the amount in default was demanded, sell the premises in the usual way. The proceeds of such sale were to be appropriated, (1) in payment of certain expenses; (2) in payment of moneys paid for insurance premiums, etc.; (3) in payment of all overdue coupons; and lastly, in payment of the principal moneys until all were paid. The mortgage also contains a further proviso by which in case the defendants should become insolvent or any order for winding up the company should be made, the whole of the said bonds and interest to that date should immediately become due and payable although the time for payment had not expired; and the power of sale and right of foreclosure exercised as in the case of a

default under the proviso already mentioned. Then follows the clause upon which this application depends: "And it is hereby further agreed and understood that in case of any default being made by the said company upon or by reason of which the power of sale hereinbefore written may be exercised, then the said trustee may, and upon the request of the majority in value of the said bondholders so to do, shall elect and declare the whole of the principal money of \$280,000 and interest thereon made payable under and by the said bonds and secured by these presents and the bonds given therefor to be due and payable and upon service of notice of such declaration upon the said company or upon advertisement of the same in any newspaper published in the city of St. John, the whole of the said bonds and all principal moneys and interest accruing on the same up to the date of the said notice shall immediately become due and payable, notwithstanding the time for the payment thereof has not expired according to the tenor and date of the said bonds."

The defendants made default in payment of interest and in consequence thereof the plaintiffs, on the request of a majority in value of the bondholders, made the declaration and gave the notice provided for in the clause which I have just mentioned. The contention made on the part of those who now represent the defendants is that the effect of this election on the part of the bondholders is to accelerate the payment of the bonds and make them payable at the date of the notice of the declaration, and that it operates in point of law so far as the rate of interest is concerned, in the same way as though that were the actual due date fixed by the bonds themselves, it being conceded that neither the mortgage nor the bonds make any provision for the payment of interest after their due date, and that everything recoverable in the nature of interest after that time is recoverable only as damages for the detention of the debt and only at the rate fixed by the statute, which at present is five per cent.: *St. John v. Rykert*, 10 S. C. R. 278; *Peoples' Loan Co. v. Grant*, 18 S. C. R. 262.

This is not a suit on the bonds or on the defendants' covenant to pay them. It is a suit to enforce the mortgage security, and as this application has reference simply to the distribution of the fund produced by a sale of the mortgaged property made under the decree in this suit, regard must be

had to the terms of the mortgage so far as it makes express provisions bearing upon the distribution. The mortgage contains an express covenant by the defendants to pay the principal of these bonds in ten years and in the meantime to pay the interest half yearly on presentation of the coupons. I am asked to imply a covenant wholly inconsistent with this express one to the effect that the company will pay the whole loan at such other date as, under any authority contained in the mortgage, the plaintiffs as trustees may declare it to be due. This would virtually alter the defendants' covenant to pay the \$280,000 in ten years to one for its payment it might be in a few days, after the most trivial default. In Palmer's Precedents, part III., p. 96, the author says: "Usually, however, as we have seen a debenture is made payable at a fixed date or at such earlier time as the principal moneys hereby secured shall become payable in accordance with the conditions indorsed hereon." He further says that two of the usual conditions indorsed on the debentures are, (1) one by which the holder has the right on default to call in the principal amount; and (2) one which makes the principal due in case of a winding-up order being made. It is this covenant, which Mr. Palmer says is a usual covenant in cases of this kind, but which has been omitted from this mortgage, which I am asked to incorporate into the mortgage by implication. Had the defendants in fact made such a covenant, however onerous it might seem, it would be one of the conditions upon which the loan was made, and this Court would not consider it in the nature of a penalty so as to grant any relief. But I can see nothing which requires me to imply any such covenant in order to carry out the intention of the parties: In *re Railway and Electric Appliances Co.*, 38 Ch. D. 597, at p. 608; *Hamlyn v. Wood*, [1891] 1 Q. B. 488.

There is certainly no express covenant either in the mortgage or the bonds or coupons except to pay principal moneys in ten years and the interest in the meantime at specified dates, and at a specified place. It was no default in the defendants that they did not pay the principal and interest at the date upon which notice of the plaintiffs' declaration was given. They probably by the plaintiffs' election were entitled to redeem under that notice, but they were under no obligation to do so. The nonpayment was not a default by the terms of the mortgage. The election

then to accelerate the payment had reference in my opinion solely to an enforcement of the security; it accelerates the time of payment but it had nothing to do with the amount which the defendants had agreed to pay, and for which they were liable.

Let us look at the rights of these parties, supposing no such provision had been in the mortgage at all. If under an ordinary mortgage the mortgagor makes default the estate, which was originally one on condition, becomes absolute, and the mortgagee can immediately file his bill for foreclosure. *Burrowes v. Molloy*, 2 J. & Lat. 521, is an express authority to this effect, and is so recognized by all text writers. The right to foreclose had nothing whatever to do with the time fixed for payment of the loan—whether it was due or not was immaterial. Coote states the rule thus: “Supposing that the principal had been made payable on a given day, no matter whether it was one year or twenty years after the date of the mortgage, with interest thereon half-yearly in the meantime, and that before the day of payment of the principal money default had been made in payment of the interest thereon, the mortgagee would at any time after that event have a right to file his bill for a foreclosure, because his right became absolute at law by the non-payment of the interest; the estate having been conveyed subject to a condition which had not been fulfilled.” See *Seaton v. Teoyford*, L. R. 11 Eq. 591. There was, however, one right which the mortgagor always had—he could come to this Court before a decree absolute and get relief on such terms as the Court might think right, usually the payment of the costs of suit and the money which was due.

In *Cameron v. McRae*, 3 Gr. 311, a question arose as to the form of the decree in such a case, whether the mortgagee was entitled by reason of the default to call in the whole principal money or whether the decree should be for foreclosure upon the defendant's failure to pay that portion of the principal already due according to the terms of the mortgage. And the decree was that if the mortgagor paid the whole principal, interest, and costs, within a certain time, he should be entitled to a reconveyance, but in default of that, he was to be foreclosed of his equity of redemption. There is not in my opinion any question that in such a case the mortgagee is entitled to interest at the rate secured to him by the mortgage and not to interest in the na-

ture of damages for the detention of the debt. If it were not so all the mortgagor would have to do in order to get rid of paying interest at the rate agreed upon would be to make default and pay none.

Take another case. This mortgage contains a proviso that in case a winding-up order is made against the company the whole of the bonds should become due and payable and the power of sale and right of foreclosure exercised in order to realize the security. As to the right of foreclosure and sale the same result would have happened without the provision: *Holden v. Tea Co.*, 14 Ch. D. 859; *Wallace v. Universal Co.*, [1894] 2 Ch. 547.

In the latter case the debentures contained no provision making the whole principal due on default of payment of interest or in the event of a winding-up, but the Court held that although the debt was not due the security could be realized. (Citation from the judgment).

In the decree that was there made there was a declaration of the plaintiff's right and an account was ordered to be taken on that footing of what was due for principal and interest on the bonds to the time of actual payment. There is no suggestion that the interest should be calculated at any other rate than mentioned in the debenture or that it was recoverable otherwise than as interest agreed to be paid. This acceleration clause is, however, in the mortgage, and the question very naturally is asked, what is its effect or is it altogether useless? The argument was that if it was good for anything it was good for everything, and that therefore for all purposes the mortgage money was to be treated as due under the declaration and the agreement to pay interest must be treated as an agreement to pay interest up to that time only. It is certain that without the aid of this clause in any way this bill could have been filed and the usual decree in such cases made as provided for by s. 203 of the Supreme Court Equity Act. Under such a decree the proceeds of a sale of the mortgaged premises would have been used in payment of principal not due as well as that which was due. By s. 204, however, the mortgagor has a statutory right to relief which this Court always gave without any such statute, that is to have proceedings in a case like this stayed by paying the amount due and costs. That is an equitable relief which the mortgagor gets in order to avoid the effect of his own default. If, however, in a case like

this where the principal money will not be due for ten years, if the mortgagor could defeat every suit instituted for foreclosure by payment of the overdue interest and costs, the clause in question, if it was designed, as I assume it was, to accelerate the payment of the whole loan, would largely fail in its purpose. I can understand, however, that it may be contended that when the mortgagor came to pay the amount due in order to stay foreclosure proceedings he might be told that he must pay the amount which he had authorized the plaintiffs to say was due as principal, and that any other meaning to the clause would be inequitable, especially if the defendants' contention is right, that as a price of utilizing this clause they must abandon one half of their interest. I can understand, therefore, without expressing any opinion on the question one way or the other, that this argument might be urged with force. At present I am only interested in seeing whether the clause has any bearing on the point under discussion. I do not think it has. The rule by which interest is computed is this—the parties may stipulate for any rate of interest while the loan is current as well as after it is due, or so long as it remains unpaid, whether it is paid at maturity or later. In such a case there is no question as to the rate, for the parties have themselves fixed it. But unless it is especially provided otherwise in the mortgage, the covenant for interest only covers the period up to the due date of the principal; it is a covenant to pay *ad diem* and not *post diem*. That is the case here. There is an express agreement to pay interest at the rate of ten per cent. for the ten years. An amount, generally spoken of as interest—but in reality damages for the detention of the debt after its maturity—which in this case would be after the expiration of the ten years—may be recovered, and as no rate has been fixed the legislature has fixed it at five per cent. Formerly, and even now, it is the case, I believe, in England, there was no rate in such cases fixed by statute, but the Courts had a rate as a part of their practice. The statute has no bearing on the case except to fix the rate in cases to which it applies. It provides that “whenever interest is payable by agreement of the parties or by law and no rate is fixed by such agreement or by law, the rate of interest shall be five per cent. per annum.” How can it be said that there is no agreement fixing the rate for the whole ten years? It is

not an agreement to pay interest up to the maturity of the bonds, it is an agreement to pay interest at the rate of ten per cent. up to the year 1912. The defendants by the interest coupons expressly promise to pay a specific sum of money which is six months' interest on a specific debenture on a specified day at a specified place. The rate of interest is not affected in any way by a default occurring within the period covered by the agreement for interest. The declaration by the trustees accelerating the payment of the principal, as I have pointed out, created no new liability on the company. Nonpayment by the defendants in accordance with that declaration was no default on their part, for they never either expressly or impliedly agreed to pay the principal at that time. They were not detaining the debt any more after that declaration than before, and it is only where the party is detaining the debt beyond the period during which a rate of interest is agreed upon, that the statutory rate applies. If the rate had been agreed upon, not only for the whole ten years but after that so long as the money remained unpaid, could it be argued that the whole covenant would be swept out of existence by this declaration, and the interest rate reduced? I do not think so. The covenant was not made with a view to a default on the part of the covenantor. Whatever interest is recoverable during the ten years is I think recoverable as interest at the rate of ten per cent. per annum under the company's agreement to pay and not as damages in the nature of interest for a detention of the debt to be assessed on the statutory basis.

In *Gordillo v. Wegaelin*, 5 Ch. D. 287, the debentures provided for annual drawings of the bonds for redemption and they contained an express proviso that no interest should be payable on any drawn bond after the day fixed for its redemption. It was nevertheless held that for the purposes of paying interest such bonds stood in the same position as undrawn bonds, where the money to redeem was not provided for the purpose, and interest was recoverable notwithstanding the provision I have mentioned. I have pointed out why in my opinion I could not import into this mortgage the covenant suggested by the defendants' counsel, but if I could I am disposed to think the case would not be altered so far as the present question is concerned. Supposing that added to the existing covenants in the mortgage there was one by the defendants that in the event of

the declaration provided for they would pay the whole \$280,000 and interest at the date fixed by the notice. That would not in any way change the rate of interest or the agreement that ten per cent. per annum should be charged until the expiration of the ten years. If the due date were in such a case the date of the declaration under the acceleration clause, the rate would still be fixed up to 1912 and the covenant would be a covenant to pay post diem to that extent. If on the other hand the due date is at the expiration of the ten years the rate is fixed for that period. To hold otherwise would prevent the bondholders from taking advantage of a proviso in their security apparently intended for their benefit, which became operative only by the defendants' default, except under the penalty of losing one half their interest although the company was still in default.

I think the bonds bear interest at the rate of ten per cent. and there will be an order accordingly. No order as to costs.

NEW BRUNSWICK.

BARKER, J.

NOVEMBER 17TH, 1906.

NEW CUMBERLAND TELEPHONE COMPANY v. CENTRAL TELEPHONE COMPANY AND NEW BRUNSWICK TELEPHONE COMPANY.

Company—Telephone Company—Sale of Assets and Franchise—Contract for Use of Lines of Vendor Company—No right to Prevent Sale.

C. N. Skinner, K.C., for plaintiff.

The Attorney-General of New Brunswick (Pugsley, K. C.), Stockton, K.C., and Barnhill, K.C., for defendants.

BARKER, J.:—This is a motion to continue an interim injunction granted on the 25th September last. The plaintiffs are a company incorporated in Nova Scotia, having their head office in Amherst. The defendants are companies incorporated in New Brunswick, one having its head office at Sussex and the other at Fredericton. All of these com-

panies are carrying on the telephone business, the plaintiffs in Nova Scotia and principally in the County of Cumberland, and the defendants in New Brunswick. On the 15th June, 1906, the plaintiffs and the defendants the Central Telephone Company entered into a written agreement for the transmission of messages over their respective lines between all points in Nova Scotia reached by the plaintiffs' system, and all points in New Brunswick reached by the Central system. By the terms of this arrangement, which was to be in force for ten years, it was agreed that for the purpose of the joint business each company should give the use of its lines and instruments and the services of its employees, and also the use of any connections which either of the parties then had or might thereafter acquire over the lines of any other company doing business in either of the two provinces. The tolls to be charged were not fixed by the agreement nor was any basis determined for their division; but it was agreed that the rates were to be fixed at a later date by the managers or other officers of the companies, and they were to continue in force for the ten years or until changed by a mutual agreement between the companies "their officers, successors or assigns." The basis of division of the tolls was also to be determined later on by the companies, and the division on that basis was to be made either annually or semi-annually as might be agreed upon. The agreement also contained this clause: "It is also further understood and agreed that these presents and everything herein contained shall enure to the benefit of and be binding upon the parties hereto, their successors and assigns respectively." The two companies commenced working under this arrangement in July last, and they are now, or at least were when this suit was commenced, working under it. The bill alleges that negotiations had been going on for some time between the two defendant companies for the purchase of the Central Telephone Company's property by the New Brunswick Company; that these negotiations had resulted in an agreement for this purchase by the directors of the two companies, only requiring the ratification of the shareholders to make it binding; and that notices of meetings of shareholders had already been issued. The necessary ratification had I believe been obtained, and it may be assumed that the terms of the purchase will be carried out without further delay. The bill alleges that by the

terms of the proposed agreement for the merger of the Central Company with the New Brunswick Company no provision was made for carrying out the contract between the plaintiffs and the Central Company of the 15th June, and that unless that was done the plaintiffs would suffer great loss in its business and its stock and property would be materially lessened in value. I presume that allegation is intended to refer to matters as they stood on the 17th September when the summons in this suit was issued, for by a subsequent section in the bill it is alleged that the two defendants on the 24th September agreed in connection with the future management or position of their companies that they would carry out the agreement of the 15th June so far as to continue to the plaintiffs the reciprocal use of the Central Company's lines in New Brunswick, but would not after the merger allow the plaintiffs the use of the New Brunswick Company's lines, and that the defendants disclaimed all liability to give the plaintiffs the use of the New Brunswick Company's line in connection with their business. The bill also alleges that by law the two companies had no authority or power to enter into their proposed arrangement by which the Central Company would be absorbed by the New Brunswick Company, and that the New Brunswick Company by law had no authority to make the proposed purchase and the Central Company by law had no authority to transfer its property as proposed; and an injunction was asked for to restrain the completion of the amalgamation arrangements and any transfer by the Central Company of its property, not absolutely, but unless provisions was made for the protection of the plaintiffs' rights under the agreement of the 15th June. The agreement between the defendants which was ratified by the shareholders on the 25th September and which was made on the 21st of August, is an agreement for the purchase by the New Brunswick Company from the Central Company of all its property both real and personal consisting of its poles, wires, telephones, and all other property of every kind and description, subject to a right or privilege for the term of ten years from the 15th June, 1906, in the plaintiffs to connect its lines and exchanges with the lines and exchanges of the Central Company agreed to be conveyed to the New Brunswick Company and to use the same for the transmission of messages over and upon such lines and

delivering of the same to all persons to whom such messages are transmitted at the stations and exchanges of the Central Company which had been located, established and in operation on the 21st August, which lines and exchanges were to be owned by the plaintiffs when and so soon as an agreement should be entered into fixing the basis of the tolls. The agreement is also for the purchase of all the franchises of the Central Company, its charters, and all charters of other companies owned by it and the franchises thereof, etc.

The Attorney-General, as counsel for both these defendants, states that this claim in the agreement was inserted specially to secure to the plaintiffs all the rights and privileges to which at the time they were entitled under their agreement with the Central Company, and that if there is any doubt as to the language being sufficient for that purpose, the defendants are willing to make it so. Mr. Skinner has not contended that the language is not sufficient for this purpose, but he contends that the plaintiffs' privileges should extend to the whole system of the New Brunswick Company, and not merely to that part of it acquired from the Central Company. It is unnecessary to discuss whether or not by the merger or purchase of the property with notice of this contract the New Brunswick Company becomes liable, altogether irrespective of express contract to do so, to carry out this contract with the plaintiffs, (as to which see *Tolhurst v. Cement Co.*, [1902] 2 K. B. 660, [1903] A. C. 414, and *Wederman v. Société Générale*, 19 Ch. D. 246), because they have bound themselves to do so, and in no case could they be compelled to do more: *Pullman Car Co. v. Pacific Co.*, 115 U. S. 587.

I do not wish to be considered as thinking that the plaintiffs simply because of their contract with the Central Company could prevent that company from selling its property, except upon the condition that the purchaser would agree to assume the liability of the company under the contract. My opinion is against any such view, but discussion has been rendered unnecessary by the New Brunswick Company as purchasers voluntarily assuming the responsibility.

There is nothing I think in the point that the Central Company cannot sell or the New Brunswick Company buy the franchise or property. As the companies are only ordinary private business corporations and under no limitation as

to the sale of the property, I should have thought there was no good objection to this sale. Such companies are under no obligation to continue in business until they are wound up for insolvency. The corporate franchise I presume they could not part with, but what right have these plaintiffs to complain? They are not shareholders and have no interest whatever in the company, and are not even residents in the province within which these companies do business and from which their corporate rights have been acquired. If no shareholder or creditor complains and the Attorney-General does not intervene I cannot see how the plaintiffs can do so even if the defendants had not the power which they are exercising. The New Brunswick Company by s. 10 of its Act of incorporation, 51 V. c. 78, seems to have ample power to do all that they apparently are doing in taking over the property and business of the Central Company, and the Central Company by their letters patent have express power to make connections with any other telephone company or to lease the system or amalgamate with any other telephone company, and that seems to be ample authority for doing all that they apparently are doing. That is a question which could not very well arise except in a suit brought for the purpose of setting aside the amalgamation by some person who has an interest in the question which I think the plaintiffs have not: *Stockport Waterworks Co. v. Manchester*, 9 Jur. N. S. 267.

I think this application must be refused with costs.

NOVA SCOTIA.

LONGLEY, J.

NOVEMBER 19TH, 1906.

DILLMAN v. SIMPSON.

Conversion—Trespass—Horse used in Common—Exchange by Person not its Owner—Owner's Right to Substituted Horse.

Trial of action.

J. C. O'Mullin, for plaintiff.

J. L. Barnhill, for defendant.

LONGLEY, J.:—This action of trespass was tried before me without a jury. The facts are as follows: A man named Phelan sold a horse to Henry Isner for \$48, and took his note for the amount. The plaintiff was a tenant of Isner, occupying a house, barn, and premises, belonging to him. Isner brought the horse to plaintiff's stable and a bargain was made between plaintiff and Isner that plaintiff should have a half interest in the horse if he paid his share of the cost. Both continued to use the horse, Isner making his home most of the time with plaintiff. After a time plaintiff undertook to exchange this horse for another without Isner's concurrence.

The note to Phelan became due and he wanted his money. Isner seems not to have had the money, but he took the horse which plaintiff had obtained by a trade to Phelan and told him he would give it up to him for the note. Phelan agreed to this, took the horse into possession and forthwith took it to Musquodoboit, and put it into the barn of a friend or relative of his there.

Plaintiff went to Musquodoboit and took the horse from the barn and brought it to his own stable near Grand Lake. When Phelan discovered this he took a constable (the defendant), went to plaintiff's house and demanded the horse. Plaintiff refused to give him up. The constable with the assent of Phelan went to the barn where the horse was and finding the door locked removed or broke the lock and took away the horse.

Upon these facts I find that Phelan was entitled to the possession of the horse, that Dillman had no interest in the horse, he not having paid anything, and Isner, through whom alone he had any claim, and who was solely responsible to Phelan for the price, having given up the horse to Phelan in exchange for his note. I also find that plaintiff unlawfully took the horse from the barn in Musquodoboit to his own premises and that Phelan had a right to enter on his land and repossess himself of the horse.

But I think the defendant exceeded his power (acting for Phelan) in breaking open the door of the stable against the protest of plaintiff.

The damage was nominal, but I think plaintiff is entitled to a judgment of one dollar for the breaking.

As the merits seem to me entirely with the defendant, who was acting as Phelan's servant or agent, I do not think I should give costs. The judgment should, therefore, be for the plaintiff for one dollar without costs.

FULL COURT.

NOVEMBER 16TH, 1906.

BENT v. MORINE.

*Arrest—Absconding Debtor—Material to Support Application
—Form of Affidavit.*

Appeal from the judgment of Russell, J., refusing to set aside an order for defendant's arrest: see 1 E. L. R. 385.

The affidavit upon which the order for arrest was granted was as follows: "1. I am the above named plaintiff. 2. I have a good cause of action against the said defendant to the amount of \$295.80. I produce herewith, and marked "A" to be identified by the functionary swearing me to this affidavit, a true copy of a writ of summons issued by me this day against said defendant with respect to said cause of action, and I say that the allegations and claims in the endorsement of claim upon said writ are and each of them is true in substance and in fact.

3. I have probable cause for believing, and do believe, that the said defendant, unless he is arrested, is about to leave the province of Nova Scotia.

4. My said cause of action is the claim endorsed upon said writ. I loaned, paid, laid out and expended the moneys referred to in said claim at the request of the defendant and for his benefit, and the said defendant agreed with me to pay the interest claimed thereon."

In his affidavit on the application to set aside the order for his arrest defendant said: "4. I am an accountant by profession. I rented a furnished house in the city of Halifax on the 18th June, and my lease does not expire until the 18th of October next. I am a married man and my wife resides with me at my house, 8 Kent Street in said city of Halifax. I did not intend to leave the city of Halifax at the time I was arrested, nor did I intend to do so at the time the plaintiff's affidavit for arrest was sworn herein. It

is my present intention to remain here until late in the month of March or the month of April, 1907, and I will be in Halifax and a resident of said city when this action is tried in the ordinary course of actions in the Supreme Court of Nova Scotia, and for thirty days thereafter.

5. I am a native of the province of Nova Scotia and my wife is a native of the city of Halifax. I have no intention of leaving the city of Halifax until late in the month of March or the beginning of April, 1907, at the earliest."

The affidavits in reply detailed conversations in which defendant stated that he would not remain in Halifax and his reasons for not remaining and that he was going to Australia.

H. Mellish, K.C., for the appellant.

W. F. O'Connor, for the respondent.

The judgment of the Court was delivered by GRAHAM, E.J.:—The affidavit on which the order for arrest was made is somewhat unusual in form, but I think that the allegations set out a good cause of action in respect to the amount for which the defendant is held to bail. I agree with the finding of the Judge as to the defendant's intention to leave the province. The appeal will therefore be dismissed with costs.

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NOVA SCOTIA.

MEAGHER, J.

NOVEMBER 8TH, 1906.

HALIFAX ELECTION.

HETHERINGTON v. ROCHE.

Parliamentary Elections—Petition—Order for Examination of Respondent — Election Judges Assigned before Order Acted on—Jurisdiction Thereafter.

J. J. Ritchie, K.C., for the motion.

No one contra.

MEAGHER, J.:—I have been applied to on behalf of the petitioner to fix a time and place for the examination of the respondent under the statute, preliminary to the trial which is to take place herein.

The application to me is based on the fact that on the 28th of April, I made an order adjourning the examination (an appointment for which had been made by me while Chambers Judge) to a time and place thereafter to be fixed, and directing such examination to be had before me. According to my recollection an assignment of the judges to try the petition had not then been made. Since then an assignment was made and the trial came on before the learned Judges so assigned to that duty, and after several witnesses were examined the petition was dismissed on technical grounds. An appeal therefrom has been allowed and the trial ordered to be proceeded with.

I have concluded after deliberation to decline to make any appointment on the grounds:

1st. That the trial having been commenced and concluded without anything further being done under my order, it seems to me the latter ceased to have any force thereafter; at all events there appears to me to be enough doubt about it to justify my declining further action therein.

2nd. That the learned Judges assigned to try the petition have exclusive jurisdiction over it and over the cause, and the application at this stage under the circumstances should be made to one of them; any other view it seems to me can only be reached by putting upon the word "pending" a somewhat strained construction.

3rd. That the cause being in a sense before such Judges, and really under their jurisdiction and control, I feel that as a matter of good taste and propriety, if for no other reason, I should not exercise further jurisdiction in it.

If counsel should deem my order an obstacle to the granting of an order by one of the learned Judges referred to directing an examination and fixing the time and place therefor, I am prepared to discharge it whenever applied to for that purpose. For that purpose this may be regarded as a formal discharge thereof.

NOVA SCOTIA.

RUSSELL, J.

NOVEMBER 19TH, 1906.

REX v. TUPPER.

Criminal Law—Conviction—Motion by Prisoner for His Release because Insufficient Penalty Imposed.

Motion for release of prisoner, who was convicted before the stipendiary magistrate at Halifax of the offence of unlawfully, wilfully, and indecently exposing his person and was adjudged for such offence to forfeit and pay the sum of forty dollars, to be paid and applied according to law, and in default of payment forthwith to be imprisoned for the

term of seventy-four days unless the said sum should be sooner paid.

W. J. O'Hearn, for the prisoner.

No one contra.

RUSSELL, J.:—The prisoner claims his release because he has not been required to pay the costs of his conveyance to jail, and the case of *R. v. Van Tassel*, 5 Can. Cr. Cas. 133, is cited as authority for the proposition that a conviction omitting this requirement is bad. It seems contrary to common sense that a prisoner should set up as a ground for his discharge that he has been required to do less than the justice might have exacted from him, but there is undoubted authority for such a decision, and I would feel bound to follow it if I were sure that there was no circumstance or contention on the other side which would have been brought to my attention had the motion been opposed. The prisoner's contention seems to my mind so unreasonable and absurd, however fortified by authority, that I should prefer to have the question referred to the full Court, which is now sitting. But if the prisoner desires it, I will refuse the application simpliciter so that he may renew his application before another Judge.

NEW BRUNSWICK.

FULL COURT.

JUNE 15TH, 1906.

SHAW v. STAIRS.

Contract—Hauling Tan Bark—Cord—Agreement as to Cubic Contents—Admission of Evidence of Collateral Agreement as to Sale—Jury—Submitting Questions.

Motion by defendants to set aside verdict and judgment for the plaintiff for \$117.57, in an action in the York County Court, on a contract for hauling bark, argued before TUCK, C.J., HANINGTON, LANDRY, BARKER, MCLEOD, and GREGORY, JJ., in Easter Term, 1906.

The grounds of the motion were:

1. Misdirection of the learned Judge in directing the jury that in construing the contract (as to that part which provided for a payment on an estimate), the words "the estimate to be made on basis of 128 cubic feet to the cord and paid for accordingly," should be read into the contract.

2. Non-direction of the learned Judge in not instructing the jury that the sale of bark and survey by buyer or his agent, or the defendants, or their agent, were conditions precedent.

3. If the plaintiff had any cause of action it was for breach of contract by the defendants in not selling the bark.

4. Learned Judge was in error in not submitting to the jury, pursuant to s. 163, c. 111, and s. 78, c. 116, Con. Stat. 1905, the questions proposed by defendants' counsel.

5. Improper admission of evidence, being evidence of a parol agreement to sell bark by 1st of July, and thereby adding to the terms of the written contract.

C. H. Allen (J. H. Barry, K.C., with him), for appellants.

O. S. Crocket, for respondent.

TUCK, C.J.:—This is an appeal from a judgment of the York County Court in favour of the plaintiff. At the outset I wish to speak of the admirable and able manner in which Mr. Charles H. Allen presented the appellants' case to the Court. It was the first time he had argued a case before this Court, and it is always a pleasure to me to recognize industry and ability.

The action arises out of the following contract:—Memorandum of agreement; made this day 14th of October, 1903, between Allan E. Stairs of the Parish of Southampton and County of York, Province of New Brunswick, hereinafter called the party of the first part, and Shaw, Cassils & Co., doing business in the Parish of Dumfries, County of York, and Province of New Brunswick, as tanners under the name and style of Shaw, Cassils & Co., hereinafter called the parties of the second part: Witnesseth that the said party of the first part hereby agrees to haul all bark now on Albert J. Jordan, Isaac Murch, Thomas Perley and William Earle, properties belonging to the said parties of the second part, in consideration of the sum of \$1.87 per cord, bark to be delivered at Zealand Station on or before 1st

March, 1904, piled on skids over cross skids at least one foot from the ground in two rank piles, eight feet wide, and not less than eight feet high, capped and covered to protect it from rain and snow; bark piled so that bark will not fall down; the survey to be made by buyer or his or their agent, and Shaw, Cassils & Co., or their agent, who, failing to agree, shall each choose a man, who shall choose a third man, whose scale shall be considered final, reckoning one hundred and twenty-eight feet per cord. Bark to be estimated by agent of the parties of the second part as soon as finished. hauled and paid for accordingly. Account to be balanced as soon as bark is sold by parties of the second part, cash advances to be without interest."

After setting out this agreement in his summons or declaration the plaintiff among other things avers that he was induced to and did enter into this contract or agreement, solely upon the representation and undertaking of the defendants that the bark would be sold by the 1st July, 1904.

The plaintiff also avers that he performed all the conditions contained in the said contract on his part to be performed and fulfilled. He also avers that the defendants although often requested so to do did not either before or during the month of July, 1904, or subsequently or at any time, sell the said bark so as to enable the plaintiff to have his account balanced and receive the balance thereof, according to the terms of the said contract, notwithstanding a sale of the said bark could have been easily effected by the defendants prior to the month of July, 1904.

In the third count of the declaration the plaintiff says it was agreed between the parties that the plaintiff would receive from the defendants for hauling and delivering the said bark according to the contract, \$1.87 a cord, on an estimate to be made by an agent of the defendants as soon as the bark was delivered under the said contract, reckoning one hundred and twenty-eight feet per cord.

To this declaration the defendants say that they did not undertake or promise in manner and form as the plaintiff has complained against them.

There is another agreement between the parties in the words and figures following:

"Agreement made this 28th day of October, A.D.1904, between Allen E. Stairs of the first part and Shaw, Cassils

& Co. of the second part, that having failed to settle our differences in regard to the scale of the bark mentioned in contract, made Oct. 14th, 1903, between ourselves, we have decided to leave the matter to the decision of an arbitration. And we hereby agree to appoint William Trail and James M. Scott as arbitrators to decide this matter, who failing to agree will appoint a third man, who will decide the matter, whose decision will be final, binding and conclusive between all parties. All necessary information furnished by the above parties. All statements made before arbitration are to be under oath. The decision in the matter to be arrived at not later than the 10th November, A.D. 1904."

Under this last named agreement the arbitrators met, failed to agree and Mr. Scott, one of them, refused to consent to the appointment of a third man. So the arbitration came to nothing.

The cause was tried before Judge Wilson and a jury, who found for the plaintiff.

The only witnesses examined for the plaintiff were himself and one Rankin Moore. The plaintiff swore that he fulfilled all the terms of the contract, that he hauled all the bark on the different properties except two small piles which were on the Tom Perley lot, near the field; that he spoke to Mr. Manuel, who had charge of the job for the defendants, about these piles, pointed out the situation to him, and Manuel said he thought it would be all right, or something to that effect.

The only evidence I find in the return, as to the time the bark should be sold, was brought out in the cross-examination of the plaintiff. He there said: "In talking over to Shaw about the contract, he said that the bark would be sold not later than June. I objected to sign the contract without that stipulation."

From what I gathered from the evidence, the real point in dispute between the parties which prevented a settlement, was as to one hundred and twenty-eight feet to the cord, and one hundred and thirty-eight 2-3 feet to the cord.

There is contradictory evidence as to the two piles of bark amounting to about four cords on the Perley place, which were not hauled. The plaintiff says in effect that he had an understanding with Hiram Manuel that they were not

to be hauled. Manuel who gave evidence on behalf of the defendants and is a surveyor of lumber, in the employment of the defendants, says that the plaintiff told him that if he (plaintiff) could leave them until he was through with the hired teams, he would take his own teams and get them out, take the bark to Hawkshaw or to Zealand Station if he could do it. "I (Manuel) said I thought it would be all right either way. Plaintiff never hauled this bark. These two piles and what was on the bottom of the third had four cords. I also found a rank on the Jordan place of four and a half cords, which were there when the contract was signed."

This witness also said: "At the time the contract was made there was no conversation between plaintiff and Mr. Bull and myself as to the bark being sold on 1st July, 1904. I heard no talk between plaintiff and Shaw about the contract at the time plaintiff got his pay. I heard no talk between plaintiff and Shaw as to the quantity of bark there was to be hauled"—this witness estimated the bark at one hundred and forty feet—"Mr. Shaw said that the bark would probably be sold in June or July, but he could not guarantee a sale of it at that time."

Mr. Shaw in his evidence says: "I did not tell the plaintiff that the bark would be sure to be sold before the 1st of July, but said that in all probability it would be sold at that time, but that I would not guarantee it."

On the contrary, the plaintiff swears that Mr. Shaw did guarantee that the bark would be sold by the 1st July, otherwise he would not have signed the contract. He also says that Shaw found no fault with the bark being left on the Perley property.

I think that the jury had the right to believe the plaintiff on the two points, both as to the bark which was left, and the guarantee that the bark would be sold by the 1st July, 1904. After the survey by Manuel the defendants paid the plaintiff \$1,254, and it was only because the price of bark had dropped that the whole of it was not sold by the 1st July. Why, the defendants' contention goes so far as to say that if the bark should never be sold they need never pay; that payment was contingent on the sale of the bark. It appears to me that this is an absurd contention.

At the conclusion of the plaintiff's case, defendants' counsel moved for a non-suit on several grounds. The first one as to no proof of partnership. This proof if necessary is supplied by Mr. Shaw's evidence.

2nd. That the contract is an entire one and has not been completed, and that the right of action does not accrue until the contract is completed.

3rd. Upon a true construction of this contract, no right of action arises until the bark is sold.

4th. That there is no proof that Bull is agent of Shaw, Cassils & Co.

The motion for a non-suit was refused and I think very properly so. If the evidence of the plaintiff is to be believed, it was agreed on both sides that the contract had been completed, and that he was not to wait for his pay until the bark was sold. The motion for a non-suit was renewed at the close of the evidence on the second and third grounds with the same result.

A new trial was refused by Judge Wilson, and the case comes before this Court on appeal from his judgment.

It appears by the notice of motion for new trial that a general verdict was found for the plaintiff for \$117.57.

I think that the conclusion of the Judge of the County Court is substantially correct and the verdict ought to stand.

The grounds for a new trial are first, misdirection of the learned Judge in directing the jury that in construing the contract the words "the estimate to be made on basis of 128 cubic feet to the cord, and paid for accordingly," should be read into the contract.

I do not quite understand the force of this objection for the contract says "reckoning one hundred and twenty-eight feet per cord." These words, so far as I can see, are not read into the contract, but form part of it.

As to non-direction, it does not appear that the Judge was asked to direct the jury that the sale of bark and survey by buyer or his or their agent or by Shaw, Cassils & Co., or their agent, and agreement to submit to arbitration, were conditions precedent, and until these events happened Shaw, Cassils & Co. remained bound by their agreement, though not liable to its performance while the conditions are unfulfilled, but in my opinion the conditions were ful-

filled, for the matter was submitted to arbitration, and the arbitrators failed to agree.

I think the plaintiff had a right to bring his action for whatever was due him under the contract, and was not driven to sue for a breach of the agreement for not selling the bark.

The learned Judge left the case to the jury to find a general verdict, and was not bound to submit questions to the jury, proposed by defendants' counsel.

I do not see by the return that any objection was taken to the admission of evidence of a parol agreement to sell the bark by the 1st July, but even if there had been, I think the evidence was properly admitted and that the verdict is justified by the law and the facts.

In my opinion the appeal fails, and must be dismissed with costs both here and below.

HANINGTON, J.:—I think the appeal should be dismissed. Upon the trial it appeared that the contract was made between the parties for the hauling of certain tan bark. Then the provision to which Mr. Justice Gregory refers is that the cord should be considered 128 cubic feet, and paid for accordingly. It does not appear to me that what Judge Wilson said in his direction is wrong in telling the jury that they should judge that 128 feet fixed by the contract should be the cubic contents of each cord. The question of the quantity of bark delivered was for the jury. There was evidence that would support the finding which they made as to the quantity. The price was fixed, the contents of each cord by the contract was fixed, and therefore it was a question for the jury, and upon that they found, and I think under the evidence in this case and the facts and rulings we should not interfere with the judgment below. Parties may agree that cords of bark or logs or anything else may be a certain length under the scale; but it is a notorious fact, and I know it well from when the north shore bark was shipped here, the cordage is always 4 feet by 8 feet by 4 feet, and therefore 128 feet instead of 138½ feet fixed by law, and it is clearly open for the parties to agree upon any such terms. It may become a custom, as it has upon the North Shore, but in St. John when you ask what they will give, or require, for a cord of tan bark

they will probably say 4 feet 10 inches instead of 4 feet 4 inches, or about that. Of course they give relatively more in price; but that the parties cannot fix and determine by contract what shall be called a cord is what I cannot at all agree with.

Therefore I think the verdict in this case is right and the appeal should be dismissed with costs.

LANDRY, J., concurred.

GREGORY, J., dissented for reasons given by him in writing.

BARKER, and McLEOD, JJ., took no part.

MEAGHER, J.

NOVEMBER 26TH, 1906.

NOVA SCOTIA.

HART v. CITY OF HALIFAX.

Municipal Corporations—Illegal Expenditure of Municipal Funds—Ratepayer no Right to Maintain Action — Corporation must Sue or else Attorney-General for Ratepayers.

Action by plaintiff, a ratepayer of the city of Halifax, to have declared illegal payments made by the city to the mayor and the city engineer for their expenses as delegates to the Convention of Canadian Municipalities held at Winnipeg in July, 1905, and for repayment of the amounts.

E. P. Allison, for plaintiff.

F. H. Bell, for defendants.

MEAGHER, J.:—The defendant McIlreith, the mayor of the city, and Doane, the city engineer, were appointed delegates respectively by the city and the city board of works to attend the convention of the Union of Canadian Municipalities at Winnipeg in July, 1905.

The resolution of the council appointing the mayor is silent as to his expenses, but the appointment of the engineer was conditioned upon the payment of one-half of his expenses by the exhibition commission. Nothing was said as to the other half.

The mayor's disbursements, \$231, were paid out of a contingent fund without having been passed, or approved, by the council, or any committee of that body. The engineer's account was passed by the council and paid out of the water maintenance account. It amounted to \$111.40. The plaintiff, a ratepayer, seeks in this action against the city and the officials above named a declaration that such payments were illegal, and claims repayment thereof with interest. He sues on his own behalf as well as on behalf of all the ratepayers other than the mayor and engineer. Before action he sought leave from the city to sue in its name, which was refused. The resolution of refusal is in evidence. The only sections of the city charter referred to upon the hearing were 24, 290, 421, and 438. I have examined these, and several other sections besides with care in the light of the legal principles which should govern such an enquiry, and have reached the conclusion that the payments attacked were illegal and not susceptible of justification from any aspect. I am therefore obliged to consider whether the plaintiff is entitled to recover on either branch of the claim. The money so applied was the property of the city and was held by it upon a public trust, for public, and, in a sense charitable, purposes. But whatever may be the true view as to the city's title thereto it is obvious it could not be diverted to purposes not authorized by the charter. *The Queen v. Lichfield*, 4 Q. B. 893; *The Queen v. Thompson*, 5 Q. B. 477; *Welmer v. Mayor, etc., of Liverpool*, 26 L. T. N. S. 101; and *Attorney-General v. Balley*, 26 L. T. N. S. 392, show how strictly expenditures by civic corporations are regarded, and the strict construction applied by the Courts to their powers in that respect. These payments were unauthorized as matter of law, and therefore the city can recover them back. It was a breach of trust for the city to pay, and equally so for the officials, both of whom are salaried, to receive, those sums. The money being the property of the city the Attorney-General would neither be a necessary, nor a proper, party to a suit by the city for its recovery. There being no right or authority in the city to pay, nor in the officials to receive, these

disbursements, it follows there was neither a valid contract, nor consideration in any aspect for the payment. Knowledge of the want of power in the city to authorize, or sanction, it, must be imputed to the other defendants.

The Recorder, Mr. Bell, contended that if the city, under a contract wholly in excess of its powers, paid money to a third party, it could not recover it back because it became thereby an executed contract. I need not concern myself with a consideration of this point. I may however say that the case put has no application to the sum received by the mayor, because the city does not appear to have had anything to do with that payment.

Apart from that I am unable to perceive any difference between the facts in proof, and a case where the city accidentally, or mistakenly, made an overpayment of salary to one of its officers. Moreover the contract of a municipal corporation, not within its powers, is, in law, no contract at all, and therefore cannot be the foundation of any right.

The decisions of Mr. Justice Townshend in two suits by the town of Amherst against Read and Fillmore are opposed to the contention adverted to. The money sought to be recovered in those actions was paid by the town to the respective defendants for services as town councillors under a resolution of the council fixing the annual remuneration of councillors. It was held that the resolution and payment were in excess of the town's statutory powers and consequently the town was entitled to recover the money back.

Patterson v. Bowes, 4 Gr. 170, establishes the right of the city to sue for the recovery of moneys belonging to it (I refer to the decision after the city of Toronto was made a plaintiff), without joining the Attorney-General.

In this instance the mayor and engineer have moneys of the city in their possession to which they have no right or title; and that is quite enough to show the city's right to recover it back from them.

The inhabitants of the city constitute the corporation; some are ratepayers—others are not. The position of the plaintiff and of his fellow ratepayers is identical. He has not sustained any damage or special injury from the wrongful payments which they have not borne too; nor is he exposed to any which they will not endure with him.

It was said by Mr. Allison that while this was so his position was otherwise as between himself and those inhabitants of the city who were not ratepayers. I am unable to agree to this view. No authority was cited in support of it, and I have not seen any. But conceding it for the moment, I am unable to regard this as a class of case, nor is the suggested distinction of a character, which confers upon the plaintiff a right to invoke the aid of the Court to redress the public wrong complained of.

The inhabitants who are not ratepayers have a right to complain of the misapplication of moneys levied and collected for prescribed public uses; they too may be said to have suffered injury from such misapplication. I use the word "complain" in that sense. The plaintiff, it appears to me, does not occupy any higher plane, and therefore, even in contrast with that class, he has not sustained any special injury to entitle him under the law to sue in this form of action.

The following cases will aid in illustrating the rule in reference to the special right, or special injury, which must exist in order to vest in him an individual right of action: *Winterbottom v. Lord Derby*, L. R. 2 Ex. 316; *Pudsey Coal Gas Co. v. Bradford Corporation*, L. R. 15 Eq. 167; *Chaplin Co. v. Mayor of Westminster*, [1901] 2 Ch. 329; *Boyce v. Paddington Council*, [1903] 1 Ch. 109; and *Devenport Corporation v. Tozer*, [1903] 1 Ch. 759. To these I think I may fairly enough add *Stockport District Waterworks Co. v. Mayor, &c., of Manchester*, 9 Jur. N. S. 266, and *Johnston v. Consumers' Gas Co.*, [1898] A. C. 447. The latter however turned on the construction of the statute. The ratepayers there had an interest in keeping down the price of gas, but it was held the corporation alone could sue.

Prestney v. Mayor, &c., of Colchester, 21 Ch. D. 111, was an action by some (on behalf of all), of the freemen of the borough to establish the right of all the individual freemen to share for their private benefit the net proceeds of certain properties vested in the corporation. It was held that those entitled might sue without the Attorney-General. *Mayor of Devenport v. Plymouth and Devenport Tramways Co.*, 52 L. T. N. S. 161, decided that where an Act of parliament contained a provision for the special protection or benefit of an individual he could enforce his rights there-

under by an action without either joining the Attorney-General as a party or showing that he had sustained any particular damage.

The foregoing indicate in a general way the rule and the exceptions where a party may, or may not, sue without joining the Attorney-General.

Mr. Bell contended that a declaration could not be made where there could not be a recovery—that plaintiff could not recover any portion of the money in question—and assuming the plaintiff's contention, as to the wrongful character of the payment, was well founded (which he contested) the plaintiff could not sue, and that the right of action belonged to the Attorney-General alone.

I am forced, reluctantly I admit, to the conclusion that the plaintiff without the Attorney-General as a party is not entitled to succeed.

Mr. Allison's contention, in addition to the claim that the plaintiff had suffered special injury, was that the city was entitled to recover back the wrongful payments, and the city having refused to sue, and being defendants, the position was the same as if they were plaintiffs, and the case was therefore brought within *Patterson v. Bowes*, and finally, in these circumstances, the Attorney-General was not a necessary party. There is no doubt much force in some of these grounds, but I feel constrained under the English rule to hold that the plaintiff was not entitled to institute the action in its present form.

The Ontario cases, and a number of American cases, were cited in support of the foregoing contentions, besides many English ones relating to private corporations. *Bromley v. Smith*, 1 Sim. 8, upon which the decision on the demurrer in *Patterson v. Bowes*, 4 Gr. 170, rested, was strongly pressed upon me.

The learned Master of the Rolls (Hodgson) in *Tanton v. City of Charlottetown*, 1 E. L. R. 282, has pointed out with great clearness the distinction between the two cases. I venture to add to his able exposition that the position of the plaintiff Bromley and his associates in that case was substantially the same as if the city was a plaintiff in this.

There is nothing to be gained by a review of the Ontario cases nor of those American decisions which favour the contention made for the plaintiff on this branch. It is quite

enough to say that they are, assuming they decide all it was contended they did, not in harmony with what I conceive to be the English rule upon the subject. It would not be becoming for me to say more.

The cases relating to private corporations have no relevancy. If this was one of that class the plaintiff would be entitled to relief. If he could not obtain redress against an act ultra vires of the company in this form of action, none could be had where the corporation refused to be made plaintiff; hence the exception to the general rule so as to prevent injustice where the Attorney-General could not sue. The cases are rare indeed where the Attorney-General is entitled to sue for redress of acts wrongful or ultra vires of a private company.

The case of Attorney-General v. Great Northern R. W. Co., 1 Dr. & Sm. 154, is an instance of his right to proceed. There the question involved matter of grave damage and injury to the public. The subject is discussed at length by James, L.J., in Attorney-General v. Great Eastern R. W. Co., 11 Ch. D. pp. 482 to 485. The decision was affirmed on appeal, 5 A.C. 473, but nothing was said on that subject. See also Attorney-General v. Shrewsbury Bridge Co., 21 Ch. D. 752. Devenport Corporation v. Tozer, [1903] 1 Ch. 759, which approved Attorney-General v. Ashborne Recreation Co., [1903] 1 Ch. 101, may be usefully referred to in the same connection, as well as to the necessity of joining the Attorney-General in a case like the present.

In the case of a special injury to himself, or his property, such as a nuisance, or an invasion of, or interference with, his property, or property rights, a party may sue for redress; but where, as here, the wrong is a public one, and he has not sustained special injury, he cannot sue without the Attorney-General. The case of Chaplin v. Mayor, &c., of Westminster, above cited, emphasises the distinction above pointed out; and so also does Evan v. Corporation of Avon, 29 Beav. 144.

Reliance was placed on the observations of Lord Westbury in Stockport District Waterworks Co. v. Mayor of Manchester, 9 Jur. N. S. 266, where he spoke of what he should probably have done if he had a party before him possessing a right to restrain the Manchester Corporation—as for example the ratepayers—or if he had the Attorney-General as

an informant. There may have been some special circumstances there which justified what he said in that respect. I have not examined it in that view. But it seems to me the Lord Chancellor was not formally stating any principle as to the ratepayers' private right of action, but was discussing their right to be protected rather than the form in which such right could be enforced. But if I am wrong as to that, it is only necessary to say that even his great authority cannot be accepted against the many authorities the other way. Moreover what he said on this point was beside the real question before him, which was whether the plaintiffs, a rival company of the defendant water company, had the right to proceed in that form of action. Taken as a whole I regard his opinion as unfavourable to the present plaintiff's claim.

The question now under discussion was determined adversely to the plaintiff's contention in this Court in the case of *Whitman v. Elliot*, in April, 1886. I was not aware of the fact until I had written the foregoing. That was a suit for an injunction to restrain the license committee of Dartmouth from issuing certain licenses under the Liquor License Act which had been awarded by the town council. A restraining order was granted by James, E.J., until the further order of the Court, and on motion before the full Court to discharge that order the ground was taken that the plaintiff, a ratepayer, had no right of action; that to give him such right a public injury and a private wrong must co-exist; and that the action must be in the name of the Attorney-General. The motion was granted by the Court, consisting of McDonald, C.J., McDonald, Weatherbe, and Ritchie, JJ., and James, E.J. One of the counsel, now a member of the Bench, informs me the decision was put on the ground that the plaintiff could not sue without joining the Attorney-General. Mr. Eaton, K.C., of counsel for the plaintiff, also says the decision was upon that ground. The reporter's notes of the argument do not disclose the fact that a decision was given upon the argument. The proceedings book, however, shows that it was and the rule thereon passed the same day.

I have some reason also for believing that in an earlier case (1879) of a somewhat similar nature, viz., *Stairs v. Town of Dartmouth*, the late Judge in equity, Ritchie,

reached the same conclusion. I have been unable to find when judgment was given or what it was.

The New Brunswick decisions are to the same effect as *Whitman v. Elliot*.

I have therefore been obliged to conclude that the plaintiff must fail in the present form of action.

QUEBEC.

ROUTHIER, J.

OCTOBER 30TH, 1906.

BOUCHARD v. ELEVATOR No. 7.

*Ship—Collision—Admiralty Court—Practice—Place of Trial
—Action at Quebec—Cross-action at Montreal.*

C. A. Pentland, K.C., for plaintiffs.

Geo. F. Gibsone, for defendants.

ROUTHIER, J.:—A collision occurred in the port of Montreal between the S. S. *Gaspesian* and Elevator No. 7. Bouchard et al., the owners of the *Gaspesian*, took suit here at Quebec against the Elevator No. 7 and owners. The defendants appeared at Quebec and contested the suit. But shortly after they in turn took an action at Montreal claiming from Bouchard et al., the owners of the *Gaspesian*, damages resulting from the same collision.

Both the actions were proceeded with, the Montreal action at Montreal, and the Quebec action at Quebec, and the plaintiffs in the Quebec action applied to the Local Judge at Montreal for the consolidation of the two suits. The defendants opposed this application and the Local Judge, Mr. Justice Dunlop, dismissed the motion to consolidate and fixed the trial of the Montreal action at Montreal for the 13th November. Now the plaintiffs Bouchard et al. ask that the Quebec case be fixed for trial at Quebec on the 8th November. The defendants object and ask that this trial be at Montreal on the 13th November, the date fixed for the trial of the Montreal action.

This complication is due in some measure to the fact that the law is not very clear.

By the Admiralty Act, 1891, the Province of Québec forms a single admiralty judicial district called the Quebec Admiralty District. Each one of the other provinces forms a separate admiralty district, and s. 13 of the Act provides that when a suit is instituted in any registry, another suit resulting from the same facts and between the same parties shall not be taken in another admiralty registry.

This law was amended in 1900 by 63-64 V. c. 45, and by the amendment the Governor-General-in-Council may divide the territory of an admiralty district and establish different registries in it.

I do not know whether in the Province of Quebec this has been done officially and with the required administrative formalities, and no proof of it has been made before this Court; but it seems to me certain that *de facto* if not *de jure* there are two registries, one at Quebec, and one at Montreal, in which registers are regularly kept of the suits instituted in each respectively.

Now this amendment of 1900 provides expressly that a second suit between the same parties and for the same cause, cannot be taken in another registry when a first action is pending before the original registry. It would seem doubtful therefore whether the suit in Montreal between the same parties and with regard to the same collision, was legally taken. I do not finally express myself on this point, but I consider it serious and doubtful.

I do not think it would be equitable to force the plaintiffs in this case to have the trial at Montreal on the 13th November. The plaintiffs took their action at Quebec as was their right. They thus chose that as the place where they would hear their witnesses, who also come from Quebec. If they had been obliged to have the trial at Montreal, with the additional expense that it would have caused, perhaps they would not have taken their action. It therefore does not seem just to me to force them to proceed with their action elsewhere than at Quebec.

I should add that their action is the principal one and the first instituted; that at Montreal the incidental and accessory; and it is the incidental action which should follow the principal one. It is a general principle in procedure that

the plaintiff is largely dominus litis, and it would be rather strange to disregard that principle without there being any reason for making an exception.

It is objected that there would then be two trials. That is true; but whose fault is it?

Nothing would be more simple than for the parties to consolidate the two cases and thus make practically one, susceptible of one trial. It appears by the record that the principal plaintiffs, Bouchard et al., applied, at Montreal, for this consolidation, and that the defendants resisted the application.

Another objection is that there will be double costs of trial if the cases are tried separately. That is equally true, but it depends upon the parties. Nothing is easier for them than to make either at Quebec or at Montreal a single trial which would serve for both cases. If therefore any inconvenience follows from the order I am going to make I say firstly that it is created by law, and secondly that the parties have not, hitherto, seemed to wish to avoid it. My decision will not prevent their coming to an agreement later on. On the contrary it will probably induce them to have a single trial.

For these reasons the plaintiffs' motion is granted and the trial of the Quebec case is fixed for the 8th November instant, at the Court House, Quebec.

It is evident that I cannot prevent the Montreal case from proceeding before the local Judge there on the 13th November.

NOVA SCOTIA.

FULL COURT.

NOVEMBER 28TH, 1906.

REX v. CLARK.

Intoxicating Liquors—Canada Temperance Act—Conviction for Third Offence—Recitals of Former Convictions—Dates of Informations not Given—Amendment of Charge at Hearing—Adjournment—Waiver.

Motion for discharge of defendant, who had been convicted of a third offence under the Canada Temperance Act.

J. J. Power, for the motion.

J. L. Ralston, contra.

The judgment of the Court was delivered by GRAHAM. E.J.:—This is an application to discharge the defendant under proceedings in the nature of a habeas corpus.

The offence for which he was committed was a third offence under the Canada Temperance Act, and it is contended that the conviction is bad because the recitals in this conviction of the previous convictions are bad.

This is the recital of the former convictions: "And it also appearing to me that the said John P. Clark was previously, to wit, on the 25th day of May, 1906, at the town of Springhill aforesaid, before me the said John M. Hunter, then stipendiary magistrate in and for the town of Springhill aforesaid, duly convicted of having unlawfully sold intoxicating liquor contrary to the provisions of the second part of The Canada Temperance Act, then in force in and throughout the said county of Cumberland, between the 20th day of March A.D. 1906, and the 22nd day of May A.D. 1906, in the town of Springhill aforesaid, said conviction being a conviction for a second offence against the provisions of the second part of The Canada Temperance Act; and it also appearing to me that the said John P. Clark was previously, to wit, on the 23rd day of March, A.D. 1906, at the town of Springhill aforesaid, before me the said John M. Hunter, then stipendiary magistrate in and for the town of Springhill aforesaid, again duly convicted of having unlawfully kept for sale intoxicating liquors contrary to the provisions of the second part of The Canada Temperance Act, then in force in and throughout the said County of Cumberland, between the 20th day of December, A.D. 1905, and the 20th day of March, A.D. 1906, in the town of Springhill aforesaid, said conviction being a conviction for a first offence against the provisions of the second part of the said Act," etc.

And the contention is that these convictions should affirmatively show that the informations were respectively laid within three months after the offences of which the defendant was convicted.

The authorities show that it is competent to charge a defendant with an offence committed during a period extending between two dates. In 2 Hawkins Pleas of the Crown, c. 25 s. 82, it is said: "Yet it hath been solemnly resolved that a conviction of deer stealing setting forth the offence between the eighth and twelfth of July, etc., is sufficient."

The commitment being perfectly regular on its face and not disclosing this supposed defect the defendant obtained an order in the nature of a certiorari to bring up the conviction and the proceedings before the magistrate.

While the conviction does not disclose the dates of the laying of the informations in the respective first and second prosecutions the other proceedings brought up do disclose them, and they show that the informations were respectively laid within the three months' limit. But the defendant claims the right by this mode of collateral attack to say that these convictions are void on their face.

The form of conviction given by the statute does not contain words to indicate when the information was laid, or to indicate that it was laid within three months after the offence.

The limitation of three months is provided in a section subsequent to the penal section, namely, s. 106.

I cannot successfully distinguish this case from *Wray v. Toke*, 12 Q. B. 492. That was trespass for the seizure of goods of a publican under a conviction for a penalty for permitting disorderly conduct in his house. The conviction was made the 5th of December, 1846, and the charge was that he did on the 28th day of September, 1846, at, etc. The conviction is set out in the case. The head-note is: 'It need not be averred in such conviction that the penalty was proceeded for within three calendar months next after the committing of the offence.'

Hawkins for the publican contended: "Secondly, it is a fatal defect that the prosecution does not appear by express averment to have taken place within three calendar months of the offence. The date assigned to the offence, 'on the 28th day of September,' cannot assist for the day laid in a conviction is immaterial and does not bind to any proof: *Rex v. Chandler*, 1 Salk. 378. The form of conviction . . . says: 'Here state the offence and the time and place when committed.' That requires statement of a time properly averred to be within the three months."

Erle, J.: "The limitation of time is in a clause subsequent to the penal section and would be matter of defence."

Lord Denman, C.J., afterwards delivering the judgment of the Court, said: "It was secondly objected that it does

not appear that the prosecution was within three months after the offence. The answer is, first, that this limitation being entirely distinct from the enactment creating the offence is matter of defence and need not be noted in the conviction. And, secondly, that the form given by the statute dispenses with the mention of it had it otherwise been necessary."

The principle here enunciated may be in conflict with that determined in *R. v. Adams*, 24 N. S. R. 559, although in that case there was a direct attack on the conviction, which did not disclose that the three months' limit had not run, by a motion to quash it.

But this decision of the Queen's Bench in England, which was not cited in *R. v. Adams*, is binding on us and to be followed rather than our own decision, "since" as the Privy Council said in *Trimble v. Hill*, 5 App. Cas. 345, "in their view it is of the utmost importance that in all parts of the Empire where English law prevails the interpretation of that law by the Courts should be as nearly as possible the same."

The decision of *Wray v. Toke* was followed in Ontario in *R. v. Strachan*, 20 C. P. 185 (citation from the judgment.)

2. It is contended that the defendant had not sufficient time allowed to him after an amendment made at the trial. The information originally sworn alleged an offence between the 24th September, 1906, and the 15th of October, 1906. Upon an application made by the prosecutor at the trial the "15th" was amended to the "16th" and the information resworn. This was made to embrace the offence of keeping for sale liquor which had been seized on the 15th on the defendant's premises on a search warrant issued under the Act. The affidavits show that the defendant was expressly informed of the amendment and declared himself ready for trial on the amended charge, and that he pleaded to it and was given the fullest opportunity to examine witnesses and make his defence.

If a defendant does not ask for time or object to a case going on after an amendment made; indeed, if he requests the prosecutor to go on rather than have delay, I think under ordinary principles he cannot afterwards object that he had not sufficient time.

The section, Canada Temperance Act, s. 116, which provides for the substitution of a different offence by way of amendment contemplates that a defendant may waive his

right to an adjournment. It provides as follows: "But if it appears that the defendant has been materially misled by such variance such justices, etc., shall thereupon adjourn the hearing of the case to a future day unless the defendant waives such adjournment."

I refer to the cases of R. v. Bradley, 63 L. J. M. C. 183; R. v. Hughes, 4 Q. B. D. 614; R. v. McNutt, 28 N. S. R. 380, in which case "there was an objection not subsequently withdrawn."

The application will be dismissed.

TOWNSHEND, J.:—I fully assent to the judgment delivered, but I wish to draw attention to the fact that in the case of R. v. Adams, on which Mr. Power relied, the question before the Court had particular reference to the Nova Scotia License Act, Acts of 1886 c. 3, and in the judgment given the question appears to have been lost sight of which was before the Court in that case.

NEW BRUNSWICK.

BARKER, J.

NOVEMBER 27TH, 1906.

EDGETT v. STEEVES.

Assignments and Preferences—Bill of Sale—Presumption of Invalidity—Pressure.

Teed, K.C., for plaintiffs.

Powell, K.C., for defendants.

BARKER, J.:—This is a suit brought to set aside, as an unjust preference, a bill of sale dated 10th October, 1906, from the defendants Norman Jones and John Jones to the defendant Steeves, the consideration for which was the sum of \$576, then owing to Steeves on overdue drafts and for goods sold. The bill of sale transferred all the book debts and choses in action which the debtors had at the time, and also practically all of their stock. Steeves took possession of the stock and proceeded to collect the debts. The plaintiff

Edgett is a creditor of the Joneses for the sum of \$221.66, and their total indebtedness at that time, which is stated to be about \$1,200, admittedly was in excess of the value of their assets. This is a motion to continue an injunction restraining Steeves from proceeding under his assignment and the plaintiffs also ask for a receiver.

There is substantially no dispute as to the facts. The affidavits clearly shew that the Joneses when they made the assignment knew perfectly well that they were in insolvent circumstances and unable to pay their debts in full. Steeves' knowledge as to their position may or may not be an important factor in the case. There is no doubt, however, that he also knew of their insolvent circumstances, and he must have known that when he took all their book debts and practically all of their stock in order to satisfy his claim, little if anything remained for the other creditors: *National Bank of Australia v. Morris*, [1892] A. C. 287. There is no doubt therefore that while Steeves was only getting his pay for a debt honestly due him he did get a preference over the other creditors, and that the bill of sale was made with that object in view. It is also clear from the evidence that the assignment was made not voluntarily but under pressure from Steeves. It would therefore not be an unjust preference within the meaning of the words in s. 2, s.-s. 2, of C. S. N. B. c. 141, relating to preferences by insolvent persons, as statutes of that character have been judicially interpreted. I had occasion to refer to the cases in *Amherst Boot and Shoe Co. v. Sheyn*, 2 N. B. Eq. 250, and need not discuss them here. If an assignment is made by an insolvent to his creditor by way of preference and that assignment is his own voluntary act done on his own motion, it is a prohibited act where it is given to secure an overdue indebtedness. If, however, it is not done voluntarily, but on the demand of the creditor, and under pressure from him, the transaction loses its fraudulent character, and the preference is not unjust: *Stephens v. McArthur*, 19 S. C. R. 446,—and if this suit had been commenced after the expiration of sixty days from the time when the assignment was made, I should have thought that it could not be maintained. Sub-section 3 of s. 2, however, provides that where an action to impeach the transaction is brought within the sixty days, the assignment shall be presumed to have been made with the intent of giving the

creditor an unjust preference, and to be an unjust preference within the meaning of the section, whether the same be made voluntarily or under pressure. Two questions arise under this sub-section, and as to both of them judicial opinion in Ontario and elsewhere, where similar statutes are in force, has varied considerably. In the first place is this presumption rebuttable or is it *presumptio juris et de jure*? Most of the cases on this point were referred to on the argument; and in addition to these Mr. Powell mentioned an unreported case in which he was counsel before the Supreme Court of Canada, where it was held or taken for granted that evidence could be given to rebut the presumption. If that be the case I am bound by the decision, but altogether apart from that I am prepared to hold that the presumption can be rebutted. Without repeating the arguments in favour of that view to be found in the reported cases referred to, it would I think be going an unwarrantable length to impute to the legislature from the words used in the section an intention to render the transaction actually void if a suit to impeach it were brought within the time limit. If that was intended there was no presumption about it. A declaration to that effect was all that was required. Such, however, was not the intention of the legislature.

In the second place can the presumption be rebutted by evidence of pressure? I think it cannot. On this point I agree with the judgment of the Court of Appeal of Ontario in *Webster v. Crickmore*, 25 A. R. 97, and *Beattie v. Wenger*, 25 A. R. 72. Mr. Powell contended that the words "whether the same be made voluntarily or under pressure," mean simply that in all cases the presumption should exist. If that is the only effect of them they are altogether useless, for if they are taken out of the section the description of cases to which the section applies would not be limited in any way. The doctrine of "pressure" as applied to preferential assignments by persons in insolvent circumstances is not a modern doctrine—it was well known to those who took part in this legislation, and when they used the words in question they in effect said, this presumption shall arise in all actions brought within the time limit whether the transaction impeached was the voluntary act of the debtor or was procured under pressure from the creditor. It necessarily follows I think that evidence of pressure would not rebut the presumption. That would produce the somewhat anomalous

result that a Court bound by statute to presume as a fact that the transaction was made with a fraudulent intent even where it was procured under pressure, should at the same time find the presumption rebutted by proof that the pressure actually existed. Many other circumstances may exist which would rebut the presumption. Instances of them are furnished by many of the cases cited, but no such circumstances exist here.

I think the injunction should be continued, and that a receiver should be appointed.

NEW BRUNSWICK.

FULL COURT.

APRIL 10TH, 1906.

ROBERTSON v. FAIRWEATHER.

Practice—Appeal to Judicial Committee—Motion to Make Judgment of Judicial Committee a Judgment of New Brunswick Court.

Action in the Equity Court, where the bill was dismissed. From this judgment an appeal was taken to this Court, with the result that the judgment of the Court in Equity was reversed, and a decree entered in favour of the plaintiff. From this decision appeal was taken by the defendant Robertson to the Judicial Committee, who on the 14th of February, 1906, allowed the appeal, reversing as to the defendant Robertson the decision of this Court, and restoring the decree of the Court in Equity.

M. G. Teed, K.C., for defendant Robertson, now moved that this rule or judgment of the Judicial Committee be made and entered a judgment of this Court. The necessity of such a motion was questioned by the Court, and it was intimated that it being the duty of the Court to enforce this judgment, it should be entered as a matter of course without motion as is the practice on entering up a judgment of the Supreme Court of Canada.

Teed in reply to this stated that while it was true that it was the duty of this Court to enforce the judgment of the

Privy Council, yet it must in some way be officially brought to the attention of the Court. As to a judgment of the Supreme Court of Canada being made a judgment of this Court without motion, that depends upon s. 67 of the Supreme and Exchequer Court Act, R. S. C. c. 135, which provides that the judgment of the Supreme Court of Canada may be taken as the judgment of the Court appealed from. There does not appear to be any such rule or order in the Privy Council. The practice in the Supreme Court of Canada is to move to have the judgment of the Privy Council entered as a judgment of that Court in cases appealed: *Lewin v. Howe*, 14 S. C. R. 722. He understood that to have been the practice in this Court, though he could find no reported case where it had been pursued.

Per Curiam (TUCK, C.J., HANINGTON, LANDRY, BARKER, McLEOD, and GREGORY, JJ.): We believe this to be the correct practice and a very proper one. Your motion is therefore allowed, and it is ordered that this judgment of His Majesty's Privy Council be entered and made a judgment of this Court.

NEW BRUNSWICK.

FULL COURT.

APRIL 16TH, 1906.

NADEAU v. THERIAULT.

Jury—Juror Treated by Defendant's Attorney—Trial.

Action tried at Madawaska circuit; verdict for defendant. On a motion for a new trial a number of grounds were stated, of which one was:—"Improper communication during the trial of this cause between the jury and the defendant, and between the jury and defendant's attorney.

F. LaForest, for plaintiff, in support of this ground read an affidavit of Paul B. Cyr, to the effect that he had heard one of the jurors admit that he had been treated to a glass of liquor by the defendant's attorney while the trial was going on, and cited *McNeill v. Moore*, 14 N. B. R.

G. W. Allen, K.C., for defendant, in reply to this point read an affidavit of the defendant's attorney admitting the treating, and stating that it had been done through thoughtlessness and without any idea of influencing the juror. He therefore contended that, as it was shown that there was no corrupt intent, and as it was not claimed by the plaintiff's counsel that this act had in any way affected the verdict, and as it was practically inconceivable that it had done so, the Court would not in their discretion send the case back for another trial on this ground.

TUCK, C.J.:—This is a hard case. The verdict appears a just one, and was not in my opinion affected in the least by the treating. Yet the disposition of this Court has always been to adhere rigidly to the rule which forbids any communication between the parties or their attorneys and the jury which might possibly tend to improperly influence them. There must be a new trial.

HANINGTON, LANDRY, BARKER, MCLEOD, and GREGORY, JJ., concurred.

NEW BRUNSWICK.

FULL COURT.

APRIL 21ST, 1906.

LEIGHTON v. HALES.

Appeal—Question of Fact—Partnership.

Appeal from the judgment of the Judge in Equity, reported 3 N. B. Eq. 68, dismissing the plaintiff's bill of complaint, argued in Hilary Term, 1906, before TUCK, C.J., HANINGTON, LANDRY, BARKER, and MCLEOD, JJ.

F. B. Carvell, for the appellant.

A. J. Gregory, K.C., and J. C. Hartley, for the respondent.

The judgment of the Court was now delivered by TUCK, C.J.:—This is an appeal from a judgment of the Judge in Equity.

The bill in the case was filed to wind up a partnership alleged to have existed between the plaintiff and defendant, and praying that an account be taken.

It seems to me that the question involved is largely one of fact as to which there is some contradictory testimony.

The learned Judge has ordered that the plaintiff's bill be dismissed out of this Court with costs, except the costs of the plea of abandonment of claim, which the defendant is to pay the plaintiff.

As has frequently been said in cases similar to this, where a question of fact has to be found, the Judge who hears the evidence and has an opportunity of seeing the witnesses, their demeanour, etc., is better able to come to a correct conclusion than a Court of appeal, which has had no such privilege. On that principle alone, I would not be disposed to differ from the Judge, but having examined the evidence, if the case had come before me, in the first instance, I would have dismissed the bill.

I agree with the learned Judge that the evidence fails altogether to prove a partnership between the parties.

It is not necessary for me to analyze the evidence. The learned Judge has done that fully and completely, and has come to a correct conclusion.

As to any question of law that there is in the case, and also on the question of fact, I agree with the Judge in Equity, and think that this appeal should be dismissed with costs.

HANINGTON, J., took no part.

NEW BRUNSWICK.

FULL COURT.

APRIL 21ST, 1906.

CARLETON WOOLLEN CO. v. TOWN OF WOODSTOCK.

Assessment and Taxes—Exemptions—Discrimination—Judgment Based on Ground not Argued.

Appeal from the judgment of the Judge in Equity, reported 3 N. B. Eq. 138, allowing demurrer to the plaintiffs'

bill, argued in Hilary Term 1906, before TUCK, C.J., HAN-
INGTON, BARKER, and McLEOD, JJ.

F. B. Carvell, for the appellants.

D. McL. Vince, for the respondents.

The judgment of the Court was now delivered by TUCK, C.J.:—A bill of complaint was filed in equity in this cause whereby the plaintiffs pray, that the defendants be restrained by an injunction order of the Court from selling or otherwise disposing of the goods and chattels mentioned and referred to in the sixth paragraph of the plaintiffs' bill, or any part thereof, either by public auction or by private sale or in any other way, or from further proceeding under the said levy and notice of sale, or from issuing, publishing or serving any other notice of sale of the said property or any part thereof, and that the said goods and chattels may be returned to the plaintiffs, and for such further and other relief as to this honourable Court may seem meet in the premises; and for the purposes aforesaid that all proper orders may be made and given and accounts taken, and that the plaintiffs be paid the costs of the suit.

The sixth paragraph of the plaintiffs' bill is as follows:—
“That on the 10th day of May (1904) the town marshall of the town of Woodstock left at the office of the plaintiff company two executions which are in the words and figures following, that is to say: ‘To the marshall or any constable of the town of Woodstock: Levy and sell of the goods and chattels of the Carleton Woollen Company, Limited, the sum of \$35.10 which has been assessed upon them for town and county rates for the year of our Lord 1902, and also twenty cents for this execution, in the whole amounting to \$35.30, and have that money at my office on the 6th day of June next, and make return hereof at the day and place aforesaid.

Dated the sixth day of May, 1904.

H. W. Bourne,
Town Treasurer.

To the marshall or any constable of the town of Woodstock: Levy and sell of the goods and chattels of the Carleton Woollen Company, Limited, within the town of Woodstock, the sum of \$40.50, which has been assessed upon them

for town and county rates for the year of our Lord 1903, and also twenty cents for this execution, in the whole amounting to \$40.70, and have that money at my office on the sixth day of June next. and make return hereof at the day and place aforesaid.

Dated the sixth day of May, A.D. 1904.

H. W. Bourne,
Town Treasurer.

And on Tuesday, the 10th day of May instant, the said town marshal, acting under the said executions, seized and took away from the premises of the said plaintiff company a large quantity of woollen goods of the value of eighty-five dollars, for the purpose of satisfying the said executions, and there are now posted up at a number of places in the said town of Woodstock, a notice of sale of the said goods, so seized and taken away, for Monday, the 23rd day of May, A.D. 1904, at the hour of two o'clock in the afternoon for the purpose of satisfying the said executions."

The defendants demurred to the plaintiffs' bill because of insufficiency upon the following grounds:

1. The bill does not state such a case as doth entitle the plaintiffs to the relief thereby sought or prayed for against the defendants.

2. The bill does not state or allege that the town council or the town of Woodstock was authorized by law to exempt from taxation for a period of ten years or any other period, any company establishing a woollen mill in the said town of Woodstock.

3. The statements and allegations contained in the plaintiffs' bill do not show that the plaintiff company did establish a woollen mill in the said town of Woodstock.

This is an appeal from the decision of the learned Judge in Equity, who allowed the demurrer with costs of the demurrer and of the suit.

As is stated by that learned Judge, the plaintiffs claim to be exempt from taxation by virtue of a resolution passed on the 22nd June, 1892, under the authority of s. 1 of 36 V. c. 81 (1873). This section, which relates to the method of assessment within the town, contains the following proviso:

“ Provided also that the council may from time to time, at their discretion, give encouragement to manufacturing enterprises within said town by exempting the property thereof from taxation, for a period of not more than ten years, by a resolution declaring such exemption.”

The resolution passed in 1892 was as follows:—“ That any company establishing a woollen mill in the town of Woodstock be exempted from taxation for a period of ten years.”

After referring to some of the facts alleged in the bill, the Judge discusses the grounds of demurrer relied upon and argued by defendants’ counsel. It is not necessary that I should repeat what is said in the judgment as to the questions argued before the Judge on hearing the demurrer. The reasons are more clearly set forth than I could state them.

Upon the questions argued he says: “ I should have been prepared to give judgment in the plaintiffs’ favour.”

Then the Judge goes on to say: “ There is, however, a point involved in the case which, though not mentioned by counsel, I think I should mention, because if I am correct in my view, it is fatal to the plaintiffs’ claim. Ordinarily I should not think it within my province, or at all events necessarily a part of my duty, to do more than dispose of the questions which counsel suggest and argue. But as the Supreme Court of Canada has recently decided in *Miller v. Robertson*, 35 S. C. R. 80, which was an appeal per saltum from this Court, that a decree would be reversed, and the plaintiff’s bill dismissed upon a ground not suggested in the Court below, I think it better in the present case to express my opinion, though I do so without having heard the matter argued. If I am wrong I can be set right on appeal, or if I am right the parties may be saved some expense.”

Let me say here that the course adopted by the Supreme Court of Canada in *Robertson v. Miller* has more than once occurred in judgments of the Judicial Committee of the Privy Council.

At the outset the learned Judge states his view in this language: “ I think this resolution was not warranted by the Act, as it unfairly discriminates between companies

establishing woollen mills and private individuals engaging in the same business, giving the exemption to the one and not to the other."

The reasons for the opinion are set forth at length in the judgment.

I agree entirely with the proposition and the reasons given, and think that the plaintiffs' counsel in arguing for the appeal has failed to answer the reasoning of the learned Judge.

In conclusion the Judge in Equity says: "I think the resolution as passed is not warranted by the Act, and that the town should not be restrained from collecting the taxes."

I agree and think that this appeal must be dismissed with costs.

NEW BRUNSWICK.

FULL COURT.

APRIL 21ST, 1906.

LYNCH v. WILLIAM RICHARDS & CO.

Chose in Action—Assignment—Company—Resolution of Directors Assigning Indebtedness—Boom Company—Claim for Driving Logs—Necessity of Alleging Delivery in Boom Limits.

Demurrer to plaintiff's declaration, argued in Hilary Term, 1906, before TUCK, C.J., HANINGTON, BARKER, and McLEOD, JJ.

J. H. Barry, K.C., for plaintiff.

P. J. Hughes (G. W. Allen, K.C., with him) for defendants.

TUCK, C.J.:—This is a demurrer to the plaintiff's declaration. The declaration in the first count alleges that the defendants were "indebted to the South West River Driving Company in the sum of twenty-six hundred dollars and ten cents, for tolls due from the defendants to the

said South West River Driving Company, for driving down the South West branch of the Miramichi River in the Province of New Brunswick, certain timber, logs and other lumber," etc., and "the said South West River Driving Company did, by resolution of its board of directors, recorded upon the minutes of the company, containing apt words in that behalf, assign and transfer to the plaintiff and one Michael Welch, the said debt and chose in action arising therefrom, and the said defendant company thereupon became indebted to the plaintiff and the said Michael Welch in the said sum of money aforesaid as assignees of said debt and chose in action; and the said Michael Welch did by assignment in writing, executed by him under seal, and containing apt words in that behalf, assign and transfer to the plaintiff, his, the said Michael Welch's, right and interest in the said debt and chose in action arising therefrom, and the said defendant company thereupon became and now is indebted to the plaintiff as assignee of the said debt and chose in action, and in his own right, in the said sum of money aforesaid."

The second count, which alleges a similar assignment from the Upper South West Miramichi Log Driving Company, does not differ materially from the first so far as it affects this demurrer.

The defendant company, as to both counts of the declaration, say that they are bad in substance, and state the matters of law to be argued are (1) "there is no sufficient assignment set out in the first count of the plaintiff's declaration of the alleged debt from the South West River Driving Company to the said plaintiff and one Michael Welch," and (2), similarly to the second count.

The declaration alleges that the South West River Driving Company did by resolution of its board of directors, recorded upon the minutes of the company, containing apt words in that behalf, assign and transfer to the said plaintiff and one Michael Welch the said debt, etc.

The contention of the defendants is that there is no contract between the parties; there is only a resolution of the South West Driving Company.

It is further contended, in support of the demurrer, that it must be alleged that the logs had come into the

boom limits during the season and had been rafted. It does not appear from the declaration that there was any debt due and payable from the defendant company to the South West Driving Company. Then it is said that the logs must be driven into the boom before the driving company could recover.

As to the first contention: S. 155, c. 111, Con. Stat. 1903 (Supreme Court Act), enacts that "every debt and any chose in action arising out of contract, shall be assignable at law by any form of writing which contains apt words in that behalf, but subject to such conditions or restrictions in respect of the right of transfer as may appertain to the original debt, or as may be connected with, or be contained in the original contract, and the assignee thereof may bring an action at law in his own name, as the party might to whom the debt was originally owing, or in whose favour the right of action originally arose, or he may proceed in respect of the same as though this chapter had not been passed."

Now for the demurrer the argument is that a resolution of the Driving Company does not come within the meaning of the words, "any form of writing, which contains apt words in that behalf," which are the words of the section.

It is said, on the other hand, that this section differs from the English Judicature Act of 1873, which says, "by writing under the hand of the assignor" (Jud. Act, 1873, s. 25, s.-s. 6).

Leaving out, for the moment, the fact that in this case it is a company that purports by resolution to make the assignment, suppose it was an individual who made the assignment. Can it be doubted, that to make it complete it would have to be signed by the assignor? It seems to me that there cannot be a doubt but that the signature of the assignor would be necessary to make the assignment complete. If that is so, then our Act does not in substance differ from the English Judicature Act of 1873.

What have we here, so far as is alleged by the declaration? Why just this, only that the Driving Company did, by resolution of its board of directors, recorded upon the minutes of the company, containing apt words in that behalf, assign and transfer, etc. It does not appear that the

resolution was in writing (the chances are more than even that it was not); nor that it was signed by any one. Under such circumstances, it can hardly be said that there was a contract between the parties binding both of them, so that it could be enforced.

A large number of authorities were cited at the argument, to some of which I shall refer.

[The learned Chief Justice referred to and made quotations from *Dunstan v. Imperial Gas Light Co.*, 3 B. & Ad. 125; *Sears v. Kings County Elevated R. W. Co.*, 152 Mass. 151; *Thompson on Corporations*, p. 767; *Mayor of Ludlow v. Charlton*, 6 M. & W. 815; *Mayor of St. John v. Wilmot*, 7 N. B. R. 565; *Grant on Corporations*, p. 55; *Osborne v. Farmers and Mechanics Building Society*, 5 Gr. 326; *Trusts Corporation of Ontario v. Rider*, 24 A. R. 157; *Davis v. Canada Farmers Mutual Fire Ins. Co.*, 39 U. C. R. 452.]

In the present case, I think that it does not appear by the declaration that the debt or chose in action (if there was one) was assigned by the Driving Company to the plaintiff and Welch by any form of writing, which contains apt words in that behalf, and therefore on that ground there should be judgment for the defendants on demurrer.

As to the other ground, that it must be alleged that the logs had come into the boom limits during the season, and had been rafted, and unless that appears by the declaration, no debt was payable which could be assigned, I incline to think that the allegation that the defendant company was indebted to the South West River Driving Company in the sum of twenty-six hundred dollars and ten cents is sufficient, without stating the particulars as to how that indebtedness arose.

But on the other ground, I think there should be judgment for the defendants on demurrer.

BARKER, J.:—Plaintiff sues as assignee of two debts, one amounting to \$2,600.10, alleged to have been owing by the defendants to the South West River Driving Company for tolls for driving lumber down the South West Miramichi, and the other amounting to \$859.48, alleged to have been owing by the defendants to the Upper South West Miramichi Log Driving Company, also for driving the defen-

dants' lumber down the South West Miramichi. There are two counts in the declaration, one in reference to each debt; and in each count it is averred that the debt was assigned first by the creditor to the plaintiff and one Michael Welch, and then by Welch to the plaintiff. The allegation as to the first assignment is in these words, "and the said South West River Driving Company did, by resolution of its board of directors recorded upon the minutes of the company, containing apt words in that behalf, assign and transfer to the plaintiff and one Michael Welch the said debt and chose in action arising therefrom." The defendants demurred on the ground that this allegation does not show any assignment of the debt by the company so as to satisfy the requirements of s. 155 of c. 111 (C. S. 1903), which provides that "every debt and any chose in action arising out of contract shall be assignable at law by any form of writing which contains apt words in that behalf," etc.

I think the demurrer should be allowed. The allegation, if taken most favourably for the pleader, cannot mean more than that the directors met and passed a resolution which, if signed by them, would have assigned the debt, if the debt had been there to assign. The Driving Company, as a corporate body, which I am assuming to be the fact, though there is no allegation to that effect, has an entirely separate existence from its constituent parts, its shareholders or its directors. The latter may control its business and direct its affairs, but they do not own its property, and the company itself must therefore transfer that. There is no writing here signed by the company; there is no writing signed by the directors even. Until the assignment is executed it is inoperative, and in no sense the writing of the company. This resolution can at most be considered as a contract to assign the debt, but there is a manifest distinction at law between a contract to assign a debt and an actual assignment of it. To be the written assignment of the company,—and that is what the Act requires to give the assignee a right to sue at law,—it must be either under the corporate seal, or if that be unnecessary,—as I think might in the case of a trading corporation sometimes be the case,—then executed in the name of the company, and as its act by a duly authorized agent: see *Pictou School Trustees v. Cameron*, 2 S. C. R. 690; *Wilks v. Back*, 2 East 142; *Berkeley v. Hardy*, 5 B. & C. 255.

I think there must be judgment for the defendants on demurrer.

HANINGTON, and McLEOD, JJ., concurred.

PRINCE EDWARD ISLAND.

SULLIVAN, C.J.

JULY 20TH, 1906.

FAWCETT v. NORTON

Judgment—Practice—Default—Judgment Entered for More than Amount Claimed in Writ.

Motion by defendant to set aside or amend judgment.

J. J. Johnston, for plaintiff.

W. A. C. Morson, for defendant.

SULLIVAN, C.J.:—The application in this case raises a question as to the amount for which a judgment by default should be entered under s. 32 of the Common Law Procedure Act, on a writ of summons issued for a cause of action falling within that section, on which writ of summons the amount claimed is endorsed. I am of opinion that such judgment should not exceed the amount indorsed on the writ of summons. The true construction of the words in the section, that "where . . . the amount claimed is indorsed on the writ of summons the judgment shall be final," is, it appears to me, that the judgment shall be final for the amount indorsed on the writ of summons, and not for a larger sum. A judgment for any larger amount than is indorsed on the writ of summons would be of no advantage to a plaintiff as by the express words of the section he could only issue execution for a sum "not exceeding the amount indorsed on the writ of summons," whereas it might result in serious disadvantage to a defendant. Holding this view, and regarding the judgment entered in this case for \$600 (\$300 being the amount indorsed on the writ of summons, and all that is claimed by the plaintiff) as irregular, the order on this application will be for the reduction of the judgment to \$300, for which amount with costs it will

stand on record, and all other documents in the cause will be amended accordingly. The levy marked on the execution will be reduced to the amount indorsed on the writ of summons, namely \$300, with the taxed and other proper costs. The plaintiff will pay the costs of this application.

NOVA SCOTIA.

FULL COURT.

DECEMBER 8TH, 1906.

REX v. CURRIE.

Justice of the Peace—Issuing Warrant on Application of Relative—Corrupt Motives—Criminal Information.

Motion under the Crown Rules for leave to exhibit a criminal information against the defendant, a justice of the peace for the county of Hants, argued on the 8th December, 1906, before TOWNSHEND, J., GRAHAM, E.J., MEAGHER, RUSSELL, and LONGLEY, JJ.

The applicant in her affidavit swore that she had been arrested on the 2nd August, 1906, under a warrant based on information, laid on the 1st August, 1906, before the defendant by his sister-in-law, for the theft of her watch; that she had been put on trial, after a preliminary examination, at which she gave evidence, held on the day of her arrest; that a bill had been ignored by the grand jury, at Windsor, Nova Scotia, in September last; that she was innocent of the offence; that she believed that the defendant had been actuated in his judicial conduct by corrupt motives; and that he had been actively engaged for the last thirty-three years discharging magisterial functions. The defendant filed an affidavit denying that he knew he was acting illegally at the instance of his sister-in-law; that he would have given the applicant time to prepare her defence if she had asked for it; and that he did not act from any corrupt motive.

John J. Power, for the motion.

The Attorney-General of Nova Scotia (Drysdale, K.C.) for the defendant.

TOWNSHEND, J. (Oral):—We are all of opinion that this application must be dismissed, because it has not been shewn that the magistrate acted corruptly, but we think it was very improper for him to act in the matter at all. He should have referred the prosecutrix to another magistrate.

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NEW BRUNSWICK.

MCLEOD, J.

OCTOBER 10TH, 1906.

CHISHOLM v. NORWOOD.

Limitation of Actions — Title by Possession — Mother and Children Living Together — Daughter Claiming Title — Landlord and Tenant—Tenant Disputing Landlord's Alleged Possessory Title.

Trial of action..

M. MacMonagle, K.C., for plaintiff.

N. Mark Mills, for defendant.

MCLEOD, J.:—This is an action of ejectment brought by the plaintiff, Julia E. Chisholm, against Walter H. Norwood, and the plaintiff's claim is, first, that the defendant leased the lot from her and is not entitled to deny her title and that she has given him notice to quit, and he declines to give up possession, and, second, she says she holds the land by possession; that is, that she has had uninterrupted possession of the land for more than twenty years, which would give her a title. The facts appear to be that her father, Isaac Smith, was in possession of the property and lived on it for some time previous to his death. There is a receipt to him dated 7th April, 1871, for rent paid to one Captain Tobin, or paid to Mr. L. A. Mills, the agent for Captain Tobin. There is no evidence of rent having been paid since then except the evidence of Charles Tobin, saying that his uncle, Captain Tobin, who appears to have owned the property, said there was a claim of some \$100.

and if he would pay that he could have it, and he stated he arranged that Smith should pay it from time to time to Mr. Mills. Isaac Smith died in 1885, leaving a family of I think five children, all of whom were at home except one married. Then the mother and children remained on the place. The boys left, one I think the next year and the other boy left shortly. Julia E. Smith remained on and her sister Olive remained on, but was married in 1890, and left there a short time after that; and Julia E. Smith—the plaintiff—remained until her mother died.

Dealing first with the claim of title by possession: Of course uninterrupted possession without acknowledgment of title or payment of rent, will give the party in possession a good title to the property. Speaking of the possession of Isaac Smith, he appears to have been in possession, but whether he did anything more than pay the rent and the \$100 does not appear. At all events his wife remained in possession, and my view of the possession would be that it was his wife's possession and not the possession of the plaintiff. The plaintiff was living with her mother, and if her own evidence is to be taken as correct as to her age, she would not be of age at the time her father died. Of course it is stated she was some years older, and would be of age at the time her father died, but I think I would have to take it that the mother was in possession, and if anyone obtained the possession under that title it would be the mother of the plaintiff, and if she died without a will, having the title, of course the property would descend to all her heirs, which would include the wife of the defendant and the two brothers, and would include Charles Tobin too, as he was a son.

There is only one question about her being in possession. There is some little testimony about her having dower rights in the property, but there is no pretence that any dower was set off to her or any arrangement made for her having dower, but she did remain in possession of the property.

Charles Tobin says he owned the property. There appears to have been a deed executed to him from the legal owner, which was executed in 1874, but never came into his possession until 1899, although he appears to have had communication with his uncle and his uncle appears to have written he intended to give him the property.

I may say, however, that I think the plaintiff has failed to prove any possession in her such as would give her a title to the property. The most that could be said at all would be that she would be a tenant in common with her brothers and sisters of the property, assuming her mother had a title, which I do not know that I would be prepared at present to assume. It would rather look to me that being Charles Tobin's mother he allowed her to remain on the premises during her life and did not disturb her, but I think the plaintiff has not sufficiently made out a title by possession to warrant her in maintaining an action of ejectment against the defendant, because the most you can say is she was a tenant in common with her brothers and sisters, and one of her co-tenants in common was her sister, the wife of the defendant.

As to the lease of the premises: The plaintiff says that in 1896, just after the death of her mother, she leased these premises to the defendant and that he agreed to lease them from her, paying five dollars a month for them, and thereby created the position of landlord and tenant; in other words, agreed to become her tenant; and Mr. MacMonagle fairly enough says, as he agreed to become her tenant, it is not open for him to turn round now and claim she did not own the premises and deny her title. It is a well known proposition in law that a tenant cannot deny the landlord's title.

The question to be determined is whether the plaintiff did in fact lease these premises to the defendant or not. The terms of the lease are not very material. She states she was to have five dollars a month and remain there, reserving two rooms in the house to herself, and the rent was to go towards her board. She says she kept the house in repair and allowed the rent to go towards her board and paid whatever balance there might be.

The defendant's statement is entirely different. He says that after the death of Mrs. Smith the premises were rented practically by his wife from Charles Tobin, who claims to own the property and have the right to rent it. On that I have the evidence of the defendant himself, who really knows very little about it, because negotiations were carried on by his wife. Mrs. Norwood says that on the day after her mother was buried, Charles Tobin and the plain-

tiff and her brother Edwin Smith and herself being present, this question of renting the premises came up, and I think she said Charles Tobin was the first to speak of it, and the plaintiff certainly does. Charles Tobin asked the plaintiff how she would like to have Ollie, the wife of the defendant, come there and live with her, the plaintiff then being unmarried; and after the conversation given it was agreed that he would rent the premises to Norwood, the defendant, for five dollars a month, Norwood and his wife coming there to live, and the plaintiff living with them and having two rooms in the house, the rent to go towards her board; she in the first place to pay the insurance and taxes on it and the other rent to go towards her board. There is very little difference really between any of these three witnesses as to what took place. They all deny that the leasing was done by the plaintiff. They say it was by Tobin, and whilst Tobin did not have the legal title, it seems they all somehow or other recognized he had a right to it. The fact that the title was recognized by the plaintiff herself is corroborated I think by the various letters she wrote to Tobin during the years she was there. She appears to have written him at different times, always apparently acknowledging he was the owner, and that the house was being rented by him, and that she was living there not as the landlord. I think I must give effect to that. It is true that any statements she might make that way would not probably cut down her right, and I do not put it forward as that at all, but I put them forward as evidence as to what in fact was done in 1896, when the lease was made, and I feel obliged to come to the conclusion that the defendant did not lease the premises from the plaintiff; and that whether Charles Tobin had the legal right to give the lease or not, it seemed to be recognized by all parties he did have the legal right, and he did professedly give the lease, the plaintiff being present and assenting thereto. So that I must find against the plaintiff on that too.

It seems to me unfortunate an action like this can be pending; I can see at once it has arisen out of family difficulties, and it is most unfortunate it should have resulted in a lawsuit. However, I cannot help that, and under the evidence as given, which I have watched and weighed very

carefully as the case progressed, I must enter a verdict for the defendant.

Verdict will be entered for the defendant.

NOVA SCOTIA.

GRAHAM, E.J.

DECEMBER 12TH. 1906.

FULTON v. DAVIDSON.

Deed — Description — Ambiguity — Description Aided by Occupation—Trespass.

Trial of action.

H. MacKenzie, for plaintiffs.

S. D. McLellan, for defendants.

GRAHAM, E.J.:—This is an action for cutting wood on land alleged to belong to the plaintiffs.

Previously to 1804 James Fulton had partitioned off to him, as his share of a larger grant, 2,500 acres of land at Bass River. Unfortunately he attempted, without professional aid, to convey this area to four sons and a son-in-law, Crowe, by several deeds the descriptions in which are very vague.

The first was a deed to John Fulton, dated 5th January, 1804, and this is the description: "The one-fifth part of all my lands which I hold and enjoy at Bass River in the township of Londonderry aforesaid as it stands assigned to me and described on the general plan of the township by the writ of partition, being the fifth share of three full rights described and assigned as aforesaid, the same to comprehend all his buildings and improvements and the tongue and intervale marsh which he occupies, the same to be hereafter described or laid out in one tract, and as near as may be convenient to be done, to contain a proportion quantity of good and bad land, and the lines to be run in such a manner as not to discommode the farms or shares of his brothers, and to contain as described on the general plan as aforesaid 500 acres more or less . . . which

tract of land is to be considered as his share of my estate after my decease, unless I should bequeath some additional property to him hereafter."

Then there is the deed of Thomas Crowe, dated 22nd July, 1813, and this is the description: "A certain tract of land situate in Londonderry aforesaid and commonly called Kerr's mountain, bounded on the east by a line north from the Fresh Meadow to the second base line, being the bounds of David Davidson's land, and measuring 100 chains more or less, and northerly by the second base line fifty chains; thence a south course 100 chains; thence eastwardly, and including all the grass land above the old beaver dyke or dam to David Davidson's line therein and place of beginning, with a sufficiency of the pole land on the south side of the meadow for fencing the same, containing 500 acres more or less—one hundred as a deed of gift to my daughter Esther aforesaid, and the remaining 400 as a deed of purchase unto him the said Thomas Crowe his heirs and assigns."

The base line or north line and the side lines are known but the south line is susceptible of two contentions. One is that you must stop short when you have run 100 chains south from the base line and then run easterly to the grass land or meadow including it and so strike the Davidson line. The other is to reject the distance of 100 chains in favour of a rectangular figure in a straight and short line and an easterly course. But as there may be a line which would run to the Davidson line from the termination of the 100 chains, both easterly and including the meadow, without rejecting anything in the description, I must take that alternative, not, however, following the plaintiffs' plan used at the trial, which would, for a part of the distance, be westerly and southerly, following the sinuosities of the meadow, but going directly from the termination of the 100 chains to the southern edge of the meadow on the south of the meadow brook, at a point where the line of the beaver dam extended would intersect that edge, thence following the edge of the meadow to the Davidson line. Of course the pole land makes the latter course immaterial.

This about diagonally divides in two parts the area in dispute, leaving one part in the deed of Crowe, under whom defendants claim. The plaintiffs have not made out a title

by occupation to that part. The other part, I think, can be shewn to be included in David's deed.

The original grantor, James, made more deeds, one of 13th March, 1817, to Samuel; the other of 1st April, 1817, to David. This is the description in David's deed, that of Samuel being the complement of David's: "That is one-half of all that tract of land that is between the marsh land on the Bass River and the boundary of lands belonging to Portaupique Village as far northerly as the bounds of the lands I conveyed to my son John Fulton, and the lands I conveyed to Thomas Crowe, excepting the little marsh which I have assigned to my son Samuel Fulton, the birch hill, so called, where the buildings and principal improvements is, as far as the good improvable land extends, to be equally divided between my two sons Samuel and David Fulton, the said David Fulton to have the west side to include the buildings and improvements and likewise the old dyke below the house and sedge marsh around the same to the river, with the one-half of the wild marsh between the dyke and the bay as far as I own, and the spruce land or barren, and remainder to be equally divided as their convenience may best suit, and also one-half of the woodland to the west and north of that tract of land which I conveyed to my son Francis Fulton as far as my bounds extends, to be equally divided according to quantity and quality as aforesaid, containing in the whole by estimation five hundred acres more or less or the fifth part of all that land which I hold or own at Bass River, Londonderry, as it stands assigned to me by writ of partition, with the privilege of cutting and hewing frame timber for the use of his buildings wherever he may find it suitable and convenient."

David Fulton on the 3rd May, 1860, conveyed to Thomas B. Fulton, one plaintiff (with other land) the following land: "Also the one-half of all the barren land owned by me on the north side of the Bass River road or the post road leading from Londonderry through Bass River."

By deed of 23rd May, 1860, David conveyed to John James Fulton (with other land) the other undivided half I suppose, using the same terms, viz., "Also one half," etc.

John James by will left half of his land to his son Beveridge and the other half to his son Arthur.

Arthur by deed of 2nd May, 1890, conveyed to the other plaintiff, George A. Fulton, with other land, the fol-

lowing: "A lot of barren land, being and lying on the north side of road leading from Bass River to Portaupique, containing 65 acres more or less."

Going back to the southern part, or part of it rather, is it covered by the plaintiffs' deeds? It will be observed that Samuel's and David's lands go as far north as John's and Crowe's land. I have dealt with Crowe's location and his south line, but when one comes to John's land there is something vague, and it is difficult to say what is his south boundary on which David bounds. John's may extend easterly over the jog caused by stopping abruptly at the termination of 100 chains in locating Crowe's land; or Samuel and David may run north over that jog.

There are some rather argumentative facts given in evidence on the part of the defendants which tend to shew that Samuel's and David's land did not run that far north.

On 20th February, 1835, John conveyed to Thomas Fulton a piece of land occupied by Thomas, 250 acres more or less, "including the fresh meadow up to the beaver dam." That fresh meadow area is now known as the alder land and the beaver dam on the brook is well fixed. That area has been conveyed by mesne conveyances, first by Thomas to Joseph, then by Joseph to Jotham C., and by Jotham C. to Daniel Davidson, and so on. It has been fenced more or less and occupied and consists of a narrow strip as wide as a sled road and wider in some places on each side of the beaver or meadow brook. The plaintiffs have no right to it. Its importance is that it tends to show that Samuel's and David's land may not have run as far north as the locus, because this tongue of land cuts athwart the plaintiffs' alleged location if that location goes as far north as they contend for.

This grantor and his descendants, instead of adhering to mathematical lines in the deeds, rather favour irregular areas according to classes of land, meadows, barrens, hills, and so on. And John appears to have got in his deed some isolated land, "the tongue and intervale marsh which he occupies," which will account for this area. Crowe got the meadow above the dam, and John got that below. Hence this tongue of meadow on which defendants rely does not convince me that the barren land to the north of it may

not have been included in the plaintiffs' locations, i.e., in David's deed. This brings me to the question of the north boundary of David's land. Assume, as was assumed at the trial, that as between David and Samuel this area by location, agreement, or occupation fell to David. The deed to John is, I think, the only one of all the difficult deeds in evidence which might be attacked as void, because the description is so uncertain. It suggests confirmatory deeds. That made to David is not void, I think, for uncertainty in the description. There is a difference between an uncertain description and one in which the conveyance contains such poor boundaries that, although they could be identified at the time the deed was made, they cannot years after for want of evidence be proved in a court. The latter case is not a case of uncertain description.

The deed to John is helped out by the later occupation and deeds given by John's descendants. From the length of time which has elapsed since 1804, there is no difficulty about presuming a confirmatory deed then contemplated which is now lost (Reference to Washburn on Real Property, s. 2333, and *DesBarres v. Shey*, 29 L. T. N. S. 592).

The evidence given at the trial tends to show that with the exception of the alder land-strip, the west line of John Fulton is the east line of Cowe extended south of the 100 chains distance. There is some evidence of a line on the ground; also of occupation. Jotham gave evidence at the trial and he was asserting no claim to go east of that line. He says: "I own the land immediately to the west of the disputed land down as far as the brook." If, then, this part of the disputed area is not in Crowe's description and not included in the occupation of John and his descendants, it is part of David's land and is included in his barren land.

I think there is nothing in the evidence to show such an occupation of the locus by the defendants as would give them a title by occupation.

Coming to the cutting. It does not appear what portion of the wood was cut to the south of the line I have indicated, namely, a line running from the termination of the 100 chains line to the southern edge of the grass land or meadow where it is intersected by the line of the beaver dam extended.

I give judgment for the plaintiffs for nominal damages if the plaintiffs waive the assessment of damages. If they do not, I will refer the question to a referee to determine and report to me: (1) What quantity of wood was cut by the defendants to the south of such line during the two previous seasons and carried off by them, less, of course, what was retaken at the instance of the plaintiffs; and (2) what quantity of wood was taken and carried off at the instance of the plaintiffs which had been cut by the defendants to the north of such line.

The question of costs is reserved.

I have not treated the old plans marked at the trial as evidence.

NOVA SCOTIA.

MEAGHER, J. ,

DECEMBER 11TH, 1906.

HART v. CITY OF HALIFAX.

Costs—Depriving of Costs—Class Action—Plaintiff held not Entitled to Sue.

Motion as to costs of action, the judgment in which is reported ante p. 118.

E. P. Allison, for plaintiff.

F. H. Bell, for defendants.

MEAGHER, J.:—Mr. Bell did not ask for costs on behalf of the city. I should not have given them if he had, because of the city's wrongful refusal to permit its name to be used as a plaintiff for the recovery of the money illegally paid to the mayor and engineer.

If it was made clear to me that the city's refusal was to any extent induced by the efforts, or action, of the mayor and engineer, I would without hesitation deprive them of costs. There may be room for the suggestion that the elaborate presentation by the mayor of his case to the

council may have had some influence upon the council; but it is possible it may not have had any, and therefore I abstain from acting upon that ground. There is nothing to indicate interference on the part of the engineer.

Mr. Allison contended, on several grounds, that the mayor and engineer should not receive costs; amongst others, (1) because of the statute which was stealthily passed on the eve of the trial indemnifying them against the costs of this action in case the plaintiff succeeded, and throwing them upon the ratepayers; (2) because the money in question was illegally paid to them and they persist in retaining it; and (3) that the principle applied in the liquor cases should govern, namely, that where the inspector was, by law, relieved from paying costs, he should not receive any.

It would give me much pleasure to relieve the plaintiff of the payment of costs in this action; but I must not subordinate what I conceive to be the rule of law on the subject to my desire to afford him relief on that branch. He has shown commendable public spirit in endeavouring to check illegal action on the part of the city council, and should be encouraged, rather than punished, for his laudable efforts in that respect. Unfortunately for him I felt constrained to hold that he had no title to sue in the form he adopted. Where the plaintiff has no title to sue, the rule is that he must pay the usual penalty in having costs awarded against him, unless his opponent has been guilty of misconduct or oppressive conduct in connection with the litigation itself, or leading up to it, which created good grounds for depriving him of costs. While I am unable to approve of what these defendants did, I am unable to say, as matter of law, that it ought to have had any influence upon the plaintiff in bringing the action in his own name. There is some force too in Mr. Bell's contention that the alleged wrong was that of the city and not of the defendants; but it may be answered, fairly enough perhaps, that they appear to have been willing participators in it.

I am glad to know that there will be an appeal, so that any error I may have committed may be redressed.

The individual defendants will have their costs, except upon the issue or issues which asserted the payments were legal.

NOVA SCOTIA.

FULL COURT.

DECEMBER 1ST, 1906.

IN RE MCBAIN.

Mining—Coal Mines Regulation Act—Election of Check Weighman—Mode of Making up List of Voters—Acquiescence—Quo Warranto.

Motion by way of quo warranto to remove from office a check weighman elected under the provisions of the Coal Mines Regulation Act, R. S. (1900) c. 19.

J. J. Ritchie, K.C., in support of motion.

W. H. Covert, contra.

TOWNSHEND, J.:—The application must be dismissed with costs. The case made out by the applicant has been completely answered by the defendant. I have not much doubt on the other point that quo warranto would not lie in such a case, but I do not decide the case on this ground.

GRAHAM, E.J.:—This is an application for leave to file an information in the nature of a quo warranto to remove from office a check weighman elected by the miners under the Mines Regulation Act. I express no opinion as to whether it is such an office that quo warranto will lie. The applicant, who was the unsuccessful candidate, complains that a number who voted were not at that time entitled to be on the list of voters, not being then on the pay sheets of the mine from which the lists were made up. I think his case has been completely met by his opponent. The unsuccessful candidate has acquiesced in the mode in which the lists were prepared, namely, by taking the pay sheets for three months previously, inasmuch as the men are frequently changing, and has also acquiesced in the voting on that occasion and on previous occasions when he was a candidate.

The authorities shew that he cannot, now that he is unsuccessful, take advantage of the irregularity if there is one.

The application must be dismissed.

MEAGHER, J.:—I think so too. I hold that the men themselves were the judges as to the composition of the list of voters.

RUSSELL, J.:—I agree with my brother Graham.

LONGLEY, J.:—I agree that this motion must be refused. The ground upon which I reach this conclusion is that I think the list was made up properly at the time at which it was made up, and that it would not invalidate the election if at the time of the election, which was held some days later, there had been some changes in the qualification of some of those on the list. The men themselves are the proper persons to make up the list under the statute, and the affidavits satisfy me that they did this in a fair and reasonable manner, and according to the letter and spirit of the statute. It would be awkward for this Court to go behind the list in any case. I do not say that the jurisdiction of the Court is not wide enough for such a purpose, but it would require a much stronger state of facts than we have here to justify any interference.

NEW BRUNSWICK.

FULL COURT.

NOVEMBER 16TH, 1906.

REX v. SWEENEY AND BOURQUE. EX PARTE CORMIER.

*Certiorari—Order Nisi in Chambers to Quash Conviction—
Motion to Make Absolute not Opposed—Order Absolute
Granted as of Course.*

The defendant was convicted before justices of the peace Sweeney and Bourque in October, 1906, for violation of the Canada Temperance Act. An order absolute for certiorari and an order nisi to quash were granted by LANDRY, J., at Chambers, and on the return day the matter came on before TUCK, C.J., HANINGTON, LANDRY, McLEOD, and GREGORY, JJ.

J. H. Barry, K.C., in support of the order nisi to quash, read the order nisi and affidavits of the due service thereof:

and no one appearing to shew cause, moved (without any discussion of the grounds) for a rule absolute.

GREGORY, J.:—I think that there should not be a rule absolute, as a matter of course, on proof of service.

MCLEOD, J.:—I agree that these matters being before us as on a judgment of a magistrate, we should consider the grounds upon which it is sought to quash the conviction.

TUCK, C.J.:—It has been the practice ever since I have been on the bench, where there has been granted a rule or order nisi to quash, and the return is properly before the Court, that the party moving was, on proof of service, granted a rule absolute to quash, as a matter of course, where the cause had not been entered on the Crown paper, or where the rule was returnable in Term and no one appeared to show cause.

HANINGTON, J.:—I agree that under the conditions before us it has always been the practice to grant the rule. If the parties do not consider that there is enough in their case, I do not see why we should endeavour to sustain it.

LANDRY, J.:—It would, if we adopted the practice proposed by my brother Gregory, put the Court in the position that it would be taking one side of the case, that is, that the parties interested in upholding the conviction would in effect be asking the Court to act as counsel to sustain that conviction.

GREGORY, J.:—Conceding that the old practice was as is stated, it is different under the new rules, under which an order absolute for a certiorari and an order nisi to quash can be granted by a Judge at Chambers (as in the present case); and the first that the Court knows of it is on an application for a rule absolute to quash, and if this is to be granted as claimed the grounds upon which it is sought to have the conviction set aside never come before the Court to be considered. Under the old practice, however, the application for the writ, as well as for a rule nisi to quash, had to be made to the Court en banc, and the Court had an opportunity to consider whether there were sufficient grounds upon which to let the writ issue.

HANINGTON, J.:—I do not think the change in the practice affects the principle of the matter. If, under the old practice, default was made on the return of the order nisi for a writ, while the party moving would be asked to state the grounds, he was not required to discuss them.

TUCK, C.J.:—The judgment of the Court is (per TUCK, C.J., and HANINGTON and LANDRY, JJ., with McLEOD and GREGORY, JJ., dissenting), that the motion be allowed, and that there be a rule absolute to quash.

NEW BRUNSWICK.

FULL COURT.

NOVEMBER 7TH, 1906.

REX v. KAY. EX PARTE McDOUGALL.

REX v. KAY. EX PARTE LEGERE.

REX v. KAY. EX PARTE HEBERT.

Intoxicating Liquors—Canada Temperance Act — Imprisonment without Option of Fine.

These three cases were brought up on certiorari from convictions made before James Kay, stipendiary and police magistrate, Westmorland County, for violations of the second part of the Canada Temperance Act. In each case the defendant pleaded "guilty" to the charge of "keeping for sale," and was adjudged to be imprisoned in the common gaol, Westmorland county, "and there to be kept for the space of one month." Orders nisi to quash were granted at Chambers, and cause was now shewn before TUCK, C.J., HANINGTON, LANDRY, BARKER, and McLEOD, JJ.

Several grounds were stated on the granting of the orders nisi, but only one was relied upon on the argument, namely, that the conviction was bad in that it ordered the imprisonment of the defendant without the option of a fine.

A. I. Trueman, K.C., against the convictions, contended that the magistrate had wrongly interpreted c. 41, of Acts of 1904, which repealed s. 100 of R. S. C. c. 106 (Canada

Temperance Act) and substituted a new section, which provides that: "Every one who by himself, etc. . . . keeps for sale, etc. . . . any intoxicating liquor in violation of the second part of the Canada Temperance Act shall on summary conviction be liable to a penalty for the first offence of not less than fifty dollars, or imprisonment for a term not exceeding one month," etc. . . . He argued that the new section did not give power to impose an alternative penalty and of either fine or imprisonment, but that the imprisonment was to be in default of the payment of a fine, with a limitation of the term of imprisonment to one month; otherwise in case of imprisonment the maximum penalty would be one month; while in case of a fine, and default in payment, there could by s. 872 of the Criminal Code, be three months' imprisonment.

W. B. Chandler, K.C., in support of the conviction was not called on.

TUCK, C.J.:—I think the language is quite clear. The convictions will therefore stand; and the orders nisi to quash must be discharged.

HANINGTON, J.:—I agree. I think no more apt or proper words could have been used to entitle the justice to impose imprisonment without option of a fine. There can be no question about the convictions being right.

LANDRY, BARKER, and McLEOD, JJ., concurred.

NEW BRUNSWICK.

FULL COURT.

NOVEMBER 16TH, 1906.

REX v. KAY. EX PARTE HENRY CORMIER.

Intoxicating Liquors—Canada Temperance Act—Defendant Fined Larger Amount than Minimum Named in the Act.

Motion to make absolute an order nisi to quash a conviction under the Canada Temperance Act, argued on the 7th November, 1906, before TUCK, C.J., HANINGTON, LANDRY, BARKER, and McLEOD, JJ.

A. I. Trueman, K.C., supported the order nisi to quash and cited *Regina v. Smith*, 16 O. R. 454.

W. B. Chandler, K.C., contra, cited *Regina v. Cameron*, 15 O. R. 115.

TUCK, C.J.:—The defendant was convicted before James Kay, police and stipendiary magistrate, Westmorland county, of keeping for sale intoxicating liquor in violation of the second part of the Canada Temperance Act, and was fined \$200. The magistrate imposed this penalty under c. 41, Acts of 1904, being a new section 100 of the Canada Temperance Act, R. S. C. c. 106; but which new section is, as far as this case is concerned, like the former section. The words of the Act are:—"Every one who . . . keeps for sale . . . any intoxicating liquor, in violation of the second part of this Act, shall on summary conviction, be liable to a penalty for the first offence of not less than fifty dollars." He was fined \$200 by the magistrate, and the Court is of opinion that under the Act it was within the power of the magistrate to make this fine of \$200. The Act says "not less than fifty dollars." The very words of the Act shew that it gives the right to make the fine more than \$50. The object of the act is to prevent the sale of intoxicating liquor contrary to the Act in the county or place where the Act is in force; and it may have been in the mind of the Legislature when they passed the Act to give the magistrate power to impose such a fine as would prevent the sale of liquor contrary to the Act. I can quite understand that if the fine was made very large,—say, \$1,000—in this case it would be implied that the magistrate had acted from motives that were not judicial, or it would shock the judicial mind, the same as where damages are assessed by a jury in a civil case at an exorbitant figure, the Court would grant a new trial unless consent was given to reduce them. But in this case we do not think the fine exorbitant, and see no reason for interfering with the magistrate's discretion. The rule nisi to quash is therefore discharged.

HANINGTON, LANDRY, and MCLEOD, JJ., concurred.

BARKER, J., took no part.

NEW BRUNSWICK.

FULL COURT.

NOVEMBER 16TH, 1906.

IN RE THE SHEDIAC BOOT AND SHOE COMPANY,
LIMITED.

Company — Winding-up — Sale of Goods before Winding-up Order—Draft for Price Discounted with Bank—Acceptance of Goods Refused and Draft Dishonoured—Goods Taken Possession of by Bank.

Application at Chambers, referred by LANDRY, J., to the full Court, and argued on November 7th, 1906, before TUCK, C.J., HANINGTON, LANDRY, BARKER, and MCLEOD, JJ.

H. A. Powell, K.C., for the Peoples Bank of Halifax.

W. B. Chandler, K.C., for the liquidator.

LANDRY, J.:—The Shediac Boot and Shoe Company, before going into liquidation, shipped an order of goods to M. H. McMillan, Newcastle, to the value of about two hundred dollars. The company had an understanding with the bank that they would draw on their customers as goods were being forwarded, and that these drafts would be discounted by the bank. They did this in this instance before the boots and shoes were delivered or accepted. The draft was dishonoured, and the boots and shoes were not accepted, but were left at the station in Newcastle. When the draft was dishonoured the company was notified by the bank, and a consultation was held between the bank officials and the manager of the company and one of the directors, and at that conference it was agreed between them that the manager of the company should proceed to Newcastle and there take possession for the bank of the boots and shoes, and having taken possession, continue negotiations with the merchant to whom they were addressed for the purchase of them. The manager did go, and I have no evidence before me as to what took place, but he reported when he returned that the customer might possibly take the boots and shoes, but negotiations had not been completed. Matters were left in that way for some time, and then the customer notified the company that he would take them at a

discount of twenty per cent. on the original price. The company and the bank refused to take that, and matters stood in that way until the company went into liquidation. Then the liquidator agreed with the bank officials that he should take charge of the boots and shoes, dispose of them, and keep the proceeds in his possession until it was decided by the Judge before whom the proceedings were taken to whom the money should go. That application was made to me, and I heard the evidence of the manager of the bank and the petition of the liquidator of the company upon which the application was made; and having heard that evidence and the reading of the petition, I thought it better to leave it to the Court to give me directions as to what I should do. The Court has decided to direct me that the money rightly belongs to the bank; that, inasmuch as the manager of the bank had agreed with the manager of the company and one of their directors that he, the company's manager, should go up and take possession of these goods for the bank, the bank had not only acquired in these goods an equitable title, but had actually acquired perhaps a positive title because of the fact of his going to take possession for the bank; and further that the agreement between the bank and the liquidator did not change the right of the bank to the proceeds, as it might originally had they themselves disposed of them.

Therefore the decision is that the money should go to the bank and not to the liquidator.

TUCK, C.J., HANINGTON, and McLEOD, JJ., concurred.

BARKER, J., took no part.

NOVA SCOTIA.

FULL COURT.

DECEMBER 15TH, 1906.

REX v. BURNS.

*Bail—Estreat—Notice to Surety to Perform Condition—
Criminal Law—Adjournment at Accused's Request for
More than Eight Days.*

Motion to estreat bail, made before GRAHAM, E.J., and referred by him to the full Court.

A. G. Morrison, for the Crown.

J. J. Power, for the bail.

TOWNSHEND, J.:—The defendant Burns was arrested on a charge of stealing letters from the post office, and brought before the stipendiary magistrate. At his own request, and with the consent of the prosecuting officer, the examination was adjourned for ten days, on condition of his giving bail for his appearance. Mulcahy entered into a recognizance for that purpose. Defendant made default, and did not appear. The Crown thereupon gave notice to Mulcahy of such default, and of an application to estreat the bail before the Court. On making the motion, objection was taken for the bail that no notice had been served upon him requiring him to perform the condition of the recognizance. The presiding Judge referred the whole question to the full Court.

The same question was before the Court in the case of *Reg. v. Creelman*, 25 N. S. R. 404, so far back as 1893. That decision, given as it was by a divided Court, has never been regarded as satisfactory, and I assume for that reason the presiding Judge in this case again referred the question to the full Court. I say so, for otherwise he would have followed the opinion of the majority of the Court. But he must also have been aware that the same question ten years later in 1903, was again referred to the full Court, in *Rex v. Barrett*, and the Court divided once more in opinion. I regret that a larger Court did not hear the case now under consideration in the hope that the point might once for all be settled. After considering all that has been urged by counsel for the bail, I see no reason for changing the opinion I gave in the case of *Rex v. Barrett*, reported in 36 N. S. R. 135, in which I set forth as fully as possible the grounds on which I agreed with Ritchie, and Meagher, JJ., in *Reg. v. Creelman*, that notice was not legally necessary before estreating the bail, much less here where the only effect of notice would be to require the bail to perform an impossible condition.

In *Reg. v. Schram*, 2 U. C. R. 91, the Court adopted the same view under a similar statute. Also in *Re Talbot's Bail*, 23 O. R. 65, and in *Re MacArthur's Bail*, 17 C. L. T. 601. These cases are not in all respects similar, but serve to illustrate the point.

The other question was raised by counsel for bail that it could not be enforced, on the magistrate having adjourned the hearing for a longer period than permitted by the Code. In support of this contention a decision of Dillon, J., in the United States Circuit Court was cited, in which that learned Judge held that where the magistrate adjourned the investigation for a longer period than the statute allowed, and ordered the defendant to furnish bail, which was given, it could not be enforced, as the magistrate had committed an illegal act.

There is however this difference in the case under consideration, that the adjournment was made, and the bail furnished to the extended day, with the consent, and at the request of the accused, and it is perfectly clear that the surety was cognizant of this fact, although he may have been ignorant, as he says, that to adjourn for longer than eight days was not in the magistrate's power, but in my opinion the consent and request of accused constituted a waiver of what was an irregularity, or would have been illegal without it. The case of *Regina v. Hazen*, 20 Ont. App. R. 633, is in accord with this view, where the learned Judges treat the question as a matter of procedure only and the statute as directory.

For these reasons I am of opinion that the Crown is entitled to succeed in the motion now before the Court.

LONGLEY, J., concurred.

RUSSELL, J.:—In this case a motion is made to have a recognizance estreated and perfected, and the objection is taken that there was no notice given to the surety, calling upon him to perform the condition of the recognizance. The breach of the condition assigned is that the defendant failed to appear on the day to which the hearing of the case had been adjourned by the stipendiary magistrate. The case of *Reg. v. Schram*, 2 U. C. R. 91, decided that the omission to give the notice to the bail required by the statute of 7 Wm. IV. c. 10, s. 8, did not constitute a ground for relieving the bail. But the Crown Rule No. 84 expressly provides that no recognizance shall henceforth be estreated unless an order or notice shall have been previously served upon the parties by whom such recognizance shall have been given calling upon them to perform the conditions

thereof. It appears from the affidavit of Mulcahy, the surety, that no such notice was given in this case, but merely a notice of the motion to estreat. The Court seems to have held in *Reg. v. Creelman*, 25 N. S. R. 404, that a notice to the sureties calling upon them to perform the conditions of the recognizance is an indispensable prerequisite to the motion to estreat.

In view of the difference of opinion in the case of *Reg. v. Creelman*, and the serious consequences of holding such a notice as is insisted upon in the present case to be necessary, I should have preferred to hear the case re-argued before a fuller Court, but if it must be decided now, I feel bound by what I understand to have been a judgment in *Reg. v. Creelman*, and to hold that the application must be dismissed.

NEW BRUNSWICK.

FULL COURT.

JUNE 15TH, 1906.

MCCREA v. WATSON.

Intoxicating Liquors—Liquor License Act—Conviction—Habeas Corpus—Discharge of Prisoner by County Court Judge—No Right of Appeal by Prosecutor to Supreme Court—Judge's Duty on Habeas Corpus Application to Consider Evidence—Contemporaneous Convictions—Concurrent Terms of Imprisonment.

The defendant Watson on the complaint of McCrea, license inspector for Victoria county, was convicted before McQuarrie, police magistrate for Andover and Perth, Victoria county, of eleven offences against the Liquor License Act (c. 22 Con. Stat. 1903); and in default of payment of the fines imposed was, on the 27th of October, 1905, committed to gaol on eleven separate commitments, each for the space of three months. Application was made on the 6th of February, 1906, to Carleton, Co.J., under habeas corpus proceedings, for his discharge from imprisonment, on two grounds: 1st, that the terms of imprisonment in the several warrants were concurrent and not consecutive, and the time or term of imprisonment had expired; and 2nd,

that the warrants (which were in the form given in the Summary Convictions Act, form 25, Con. Stat. 1903, c. 123) were bad in not following the form prescribed by the Liquor License Act. On the return of the summons granted, the warrants of commitment were before the Judge, but not the proceedings before the convicting magistrate, the Judge being of opinion that he had no power to compel the magistrate to send them before him. The Judge ordered the discharge of Watson from imprisonment, basing his decision on the second ground and not discussing the first.

An appeal was brought to the Supreme Court under s. 105 of the Liquor License Act; the certificate of the Attorney-General as required by this section having been obtained, and all proper notices having been given, but the clerk of the County Court did not certify to the Supreme Court the proceedings as required by this section, and informed the appellant's counsel that they had not been filed with him by the County Court Judge.

Application was made, on affidavits, on behalf of the appellant, to the full Court in Easter Term last, for a writ of certiorari to issue to Carleton, Co.J., requiring him to certify to the Supreme Court the proceedings had before him in this matter, and for another writ to issue to the convicting magistrate McQuarrie requiring him to certify the proceedings had before him. The writs were issued, and were returned with the required proceedings; and the appeal came on to be argued on the 7th of June, 1906, before TUCK, C.J., HANINGTON, LANDRY, McLEOD, and GREGORY, JJ.

T. J. Carter, for appellant.

Thos. Lawson, for respondent.

A preliminary objection was taken by the counsel for the respondent that the appeal was not properly before the Court; that the Court could consider only proceedings that had been certified by the clerk of the County Court as required by s. 105 of the Act; and not those proceedings which had been returned to the writs of certiorari. The Court heard the appeal subject to this objection.

TUCK, C.J.:—At the conclusion of the argument in this case, I expressed in pretty full terms my view that an appeal

would not lie under Con. Stat. 1903, c. 22, s. 105, because an appeal will not lie from any decision of the County Court in a matter of habeas corpus unless given by the Act, and notwithstanding the argument very strongly made by counsel for the appeal, it seemed to me that although the provisions of s. 105 are very full, yet they do not cover the matter of habeas corpus. If the matter had been before a judge of the Supreme Court and he had granted the discharge of the defendant, there would be no appeal, and in matters of habeas corpus the jurisdiction of the two courts is co-ordinate. It however never was in contemplation of the Legislature when they passed s. 105 that habeas corpus would be included in the matters subject to appeal, and therefore without going as fully into the matter as I did the other day, I quite agree that there is no appeal from the judge of the County Court in the matter of habeas corpus and therefore this appeal should be dismissed. I give no opinion as to whether it could come here by certiorari or not.

HANINGTON, J.:—In this case the defendant had been convicted for selling liquor contrary to the Liquor License Act, Con. Stat. 1903, c. 22, and had been committed to gaol on a number of warrants, I think committed on eleven separate warrants. Application was made to the Judge of the Victoria County Court for his discharge under the Habeas Corpus Act, and the Judge having heard the matter discharged him.

Mr. Carter took steps to appeal under s. 105 of c. 22 of the Act. Certain proceedings, however, were not forwarded here and Mr. Carter applied for a certiorari to have these proceedings sent here, so that this Court might have them before them on the hearing of the appeal from the order of the County Court Judge discharging from imprisonment, the question being whether or not he was right in granting to the defendant his discharge on the habeas corpus application.

Mr. Carter having brought this matter as an appeal from the County Court, having also the right to move for a rule nisi to quash, chose to proceed in this matter as a County Court appeal. The question in this case is whether the appeal lies from the decision of the judge of the County Court upon an application for an order for discharge under

habeas corpus proceedings. Mr. Carter relied upon s. 105 of the Liquor License Act, c. 22, and contended as this was a matter arising out of or under that Act and consequent upon it, therefore this Court had jurisdiction. The words of the section are:—"An appeal by the inspector or other prosecutor shall lie to the Supreme Court from the decision, judgment, or order of any judge of a County Court, upon an appeal from any conviction or order made in cases arising out of or under this chapter, in which a conviction or order has been quashed or set aside upon the ground, directly or indirectly, of the invalidity of any Act or Acts of the Legislature of this Province, or of any part thereof, or from the decision, judgment, or order of the judge of a County Court in any other case arising out of or under the chapter in which the Attorney-General of the Province shall certify that he is of opinion that the matters in dispute are of sufficient importance to justify an appeal." By legislation (s. 12 of the Act respecting Habeas Corpus, Con. Stat. 1903 c. 133), the judge of a County Court is given all the powers that a judge of the Supreme Court had in relation to habeas corpus for the discharge of persons in custody under process. That being so, is this order for discharge made by the judge a proceeding, or a case arising out of or under c. 22?

I am of opinion, and the Court are of opinion, that it is not such a case, and that this appeal will not lie, whatever may be the right of the party to bring the matter before us by way of certiorari; and upon that we do not express an opinion at the present time. We think that the words "in any other case arising out of or under this chapter" are intended by the Legislature to be confined to such case as by this chapter the power is given to the County Court judge to determine, and do not apply to cases where outside of this chapter entirely, and under the provisions of another chapter, express authority is given to the judge of the County Court to adjudicate by way of habeas corpus upon the rights of a person imprisoned under process, and if held without warrant to discharge him. Therefore we think that this is not a case where an appeal is provided for under s. 105.

The question arose on the argument as to whether or not the judge (either of the County Court or Supreme Court) who hears the matter of habeas corpus, involving a ques-

tion whether a conviction upon which the warrant of commitment had been given had been rightly made, should have before him the proceedings upon which the conviction is made. I have a very strong opinion that a judge should not discharge the prisoner from custody upon the hearing of a habeas corpus to inquire as to a commitment such as this without having the papers before him so that he can see whether or not an offence has been committed.

I remember where an application was made to the late Mr. Justice Wilmot for the discharge of a prisoner committed for trial in Westmorland, in which the warrant being bad he ordered the discharge; but in that same order says, "But I hereby command the said sheriff to immediately retake the said prisoner into his custody and him keep," etc., setting out the charge fully, as in the papers before him, "until he is discharged according to law."

This is the course I have pursued in such cases. I require the depositions that have come before the magistrate to be produced in order to test exactly by what authority and evidence the warrant issued.

I might mention a case of habeas corpus before me within the last few months for the discharge of a prisoner in the Maritime Penitentiary, *Rex v. Wright*, 10 Can. Cr. Cas. 461. The clerk of the Circuits in Nova Scotia had not stated in the warrant of his commitment the day the prisoner was convicted, and that made the warrant and his imprisonment illegal; and he would have been discharged under the authority of *Ex parte Stather*, 25 N. B. R. 374, but the Attorney-General was notified, and in the meantime, before the return came in for the warrant, ordered a proper certificate to be forwarded to the warden which he returned before me, and the prisoner was refused his discharge. That is consistent with what I think is now the practice.

The appeal should be dismissed with costs.

LANDRY, J.:—I agree with the reasons given by Mr. Justice Hanington. I think the judge of the County Court should have had before him all the proceedings. It would not have changed his jurisdiction; but before acting in a matter of that kind I think it would have been most proper for him to have got all the proceedings, which he did

not. But as it would not change his jurisdiction it is not important.

In a matter of this kind there is no appeal under the Liquor License Act, and the appeal should be dismissed.

McLEOD, J.:—I also agree, for the reasons given by Mr. Justice Hanington, that there is no appeal under s. 105.

GREGORY, J.:—I am of opinion that this matter is not a matter such as is contemplated by s. 105 of the Liquor License Act, Con. Stat. 1903, c. 22. It was sought to be brought here by virtue of a certificate from the Attorney-General, given under that section; and the certiorari was resorted to in order to have before this Court the proceedings that were had before the judge of the County Court.

I can see no objection to getting the proceedings here by certiorari, if it is a case covered by s. 105, and if as in this case there was difficulty, if not refusal, in getting here the proceedings had before the judge of the County Court, certiorari was resorted to in order to have the papers here, that we might proceed as by appeal, if appeal lies.

I also think that the judge of the County Court was justified in discharging the party upon an entirely different ground,—one which has not been noticed here,—and that is, that he had served his term of imprisonment in the common gaol to which he was committed, and on the merits, entirely independent of any question of procedure, the judge of the County Court was justified in setting him at large.

There were eleven convictions and eleven committals, each of them for three months. Defendant had served three months before this motion or application for discharge was made, and the detaining him further was justified upon the ground that he should properly be detained in custody for the other ten terms; but my view is that the terms of imprisonment would run concurrently, unless there had been proper adjudication to the contrary. It is true that s. 76 of the Liquor License Act says that the terms of imprisonment shall run consecutively, but that had not been so adjudged by the magistrate, nor had he made any order at all respecting when the time of imprisonment should apply or be enforced as satisfaction of each conviction. That is answered again by saying that the section

made them consecutive and therefore that the jailor should hold him by virtue of the section; but I am fully satisfied that that would not be the effect of the section at all, that it would not give the jailor power to apportion the term of imprisonment, and put one term to one conviction, and another to another conviction at his choice; but the apportionment should be a part of the judgment given by the magistrate. So on the merits as well as upon the lack of authority and application of s. 105 to reverse the act of the County Court judge, I think the order should not be disturbed, and the appeal should be dismissed with costs.

PRINCE EDWARD ISLAND.

FITZGERALD, J.

NOVEMBER, 1906.

MCKINNON v. COFFIN.

Assignments and Preferences—Fraudulent Preference—Attachment of Debts—Insurance—Loss—Assignment before Service of Attaching Order—Right to Attack Assignment—Assignments and Preferences Act not Limited to Traders.

W. A. Weeks, for plaintiff.

Defendant in person.

Garnishee in person.

W. A. O. Morson, K.C., for assignee of defendant.

FITZGERALD, J.:—Garnishee proceedings were instituted by the plaintiff before judgment, and the Sun Life Insurance Office of London served with an order attaching certain moneys in their hands coming to the defendant, under a policy to him on a loss adjusted but not paid.

Some days previous to the commencement of these proceedings, the defendant, a physician, executed to his father an assignment of all his interest in this policy. On the appearance of the agent of the garnishee, and he suggesting the interest of the assignee William S. Coffin in the loss payable by his company, an order was made under the

Garnishee Act on William S. Coffin to appear and state upon oath the nature and particulars of his claim.

On the examination of the defendant and of the assignee, it appeared to me that the assignment was given for valuable consideration; but in my opinion it was also shewn that at the time defendant executed it, he was an insolvent and unable to pay his debts in full.

The plaintiff contends that this assignment is preferential and void under the Act respecting Assignments, 61 V. c. 4, as amended by 6 Edw. VII. c. 11.

The amending Act eliminates the question of the assignee's knowledge of, or concurrence in, the intent of the assignor, and also the assignee's knowledge of the assignor's insolvency.

Under the provisions of that Act this assignment given by a person at a time when he is in insolvent circumstances, within 60 days of proceedings taken to impeach it, would therefore be presumed to be null and void as against the plaintiff as a creditor.

It is contended however by the assignee's counsel, that this Act cannot be invoked in garnishee proceedings, and even if it could that it does not comprehend within its scope any persons other than persons doing business, as distinct from professional men, such as defendant is for instance.

In the first section of this Act, settling the jurisdiction of a judge of the Supreme Court, and that of a judge of the several County Courts, it enacts as regards the latter that the word "judge" in the Act, "means a judge of the County Court of the county in which the debtor or person in insolvent circumstances has a chief place of business."

The last words, speaking of the chief place of business of insolvent, it is contended, limit the Act in its operation to persons in business, as that word is interpreted in *Delaney v. Delaney*, 15 L. R. Ir. 55, and in *In re Wallace*, 14 Q. B. D. 957; though the Act otherwise (a copy of similar legislation in many of the other provinces) in its context applies to any and every person.

I do not read these words as intended to so limit the operation of the statute. They are used in a section whose object is to define the territorial jurisdiction of a County

Court judge and not intended to define the class of persons coming within the scope of the Act.

The word "business" must be read I think in its largest general sense, so as to include every one with some calling or occupation; but if possibly some professional man could not be said to have a chief place of business, it might raise a doubt as to the jurisdiction of the county court judge, but not necessarily affect the scope of our Act, otherwise drawn with a clear purpose to include every one within its provisions.

The words are, I admit, unfortunate, and should be amended by the Legislature, but I cannot so interpret them as to nullify general legislation of this character designed in its every provision for any and every insolvent.

It might reasonably be supposed that if our Legislature desired to limit the provisions of a statute general elsewhere in its application it would have done so in plain and unambiguous language.

The other objection that this assignment cannot be attacked in these proceedings, I think must also fail. Interpleader proceedings have always been held to come within the language of the statute, "any action or proceeding brought, had or taken to impeach or set aside such transactions," etc., and the levy under an execution has also been so held: *Shediac Boot & Shoe Co. v. Buchanan*, 35 N. S. R. 511. Here this assignment is set up in a proceeding before a judge under statutory proceedings giving him full jurisdiction over the subject matter.

The amount in the hands of the garnishee is bound on service of the order on him. If he suggests that it belongs to some third person, such third person is brought before the judge for inquiry as to his claim, with full power and authority vested in the judge to allow or absolutely bar such claim. If the claim as in this case rests on an assignment, its validity, if questioned, must be determined before any effective order can be made.

The words "proceeding had or taken," are most comprehensive words, and must be given some meaning different from the words "action brought."

That this is a "proceeding" cannot be doubted, nor that in it of necessity must the validity of transfers and assignments be adjudicated upon.

The statute in my judgment purposely left the validating or invalidating of all transfers by insolvents to the courts or judges named by it, in any and every proceedings in which the validity of such transfer comes in question under its provisions.

The statute prescribes no particular proceedings or form of action, and the only language it uses is so comprehensive as to include any action, or proceeding, in which certain transactions therein made void under certain circumstances are impeached.

I would refer counsel to s. 2 of 48 V. c. 4, which, independent of these considerations, gives the court or a judge in garnishee proceedings full jurisdiction over similar assignments.

The order will be that this assignment, being a transfer made by an insolvent person to a creditor, with intent to give him an unjust preference over other creditors, is, as against the creditors so delayed or prejudiced (in this case represented by the plaintiff) utterly void, and that the claim of the said William S. Coffin thereunder is hereby barred in these proceedings, and that the garnishee having paid into Court the moneys garnished in his hands, the prothonotary do pay thereout to the judgment creditor the sum of \$98.23, his debt and costs, judgment having been obtained in the meantime by the creditor against the primary debtor.

PRINCE EDWARD ISLAND.

FULL COURT.

MICHAELMAS TERM, 1906.

IN RE HIGGINS.

Intoxicating Liquors—Prohibition Act—Canada Temperance Act—Conviction—Third Offence—Proof of Previous Convictions.

Application for certiorari.

E. O. Brown, for applicant.

The judgment of the Court was delivered by

FITZGERALD, J.:—In this case it appeared that the stipendiary magistrate after hearing evidence as to the subsequent offence, adjudged the defendant guilty thereof, and that then, her attorney being present, he heard proof of two previous convictions; but that before hearing such proof, he had not asked the attorney then present, whether the defendant had been previously convicted, as alleged in the information.

It was contended that under s. 15 of the Prohibition Act (a transcript of s. 115 of the Canada Temperance Act) it was compulsory on the magistrate to do this.

This is a matter of procedure only. The statute provides that the formal proof of the previous convictions may be dispensed with on the admission of them by the defendant. But this mode of proof is only in lieu of the regular and due proof of the previous convictions, and of the identity of the defendant.

In this case the magistrate pursued the latter course; and as there is no question here of such proof having been given, other than after the accused had been found guilty of the subsequent offence, it must be held that his finding on the previous convictions can not now be disturbed, though another mode of proof is pointed out by the statute, its provisions in this respect being directory only. See *Regina v. Wallace*, 4 Ont. R. 127, and *Regina v. Brown*, 16 Ont. R. 41.

NEW BRUNSWICK.

FULL COURT.

JUNE 15TH, 1906.

FLEMING v. McLEOD.

*Bills of Exchange—Endorser—Surety—Notice of Dishonour
—Giving Time to Maker—Consideration.*

Action tried before TUCK, C.J., who gave the following judgment, in which the facts are stated:

TUCK, C.J.:—This action is brought by the plaintiffs against the defendant William H. McLeod as endorser of

four promissory notes; the first one dated the 30th of January, 1892, made by George K. McLeod, whereby he promised to pay to the order of the defendant at the office of Messrs. Robinson, Fleming and Company, London, England, £1,625 sterling, a sum amounting to \$7,908.34, on the 30th of September, 1893, without grace, and the defendant endorsed said note to the plaintiffs and one George Fleming since deceased, therein described under the name, style and firm of Robinson, Fleming and Company; the second note bearing the same date for the same amount, £1,625 sterling, payable on the 30th of September, 1894, made by the said George K. McLeod in favour of the defendant, and endorsed by him to the plaintiffs as before; the third note bearing the same date for the same amount, £1,625 sterling, payable on the 30th of September, 1895, made by George K. McLeod in favour of the defendant and endorsed by him to the plaintiffs as before; and the fourth note bearing the same date for the sum of £1,705 16s. sterling, payable on the 30th of September, 1896, made by the said George K. McLeod in favour of the defendant, and endorsed by him to the plaintiffs as before. There are the same pleas to all the counts in the declaration: first, that the several promissory notes were not duly presented as alleged; second, that the defendant had not due notice of the dishonour of the notes; third, the defendant says that after the said notes became due and while the plaintiffs were the holders thereof the plaintiffs, without consent of the defendant, and for a good and sufficient consideration in that behalf, agreed with the said George K. McLeod, the maker of the said note, to give him time and then accordingly gave him time for the payment of the said notes. There are also pleas of payment to all the notes. Then there is a plea of never indebted as alleged. At the trial the making and endorsing of the notes were admitted. At the argument before me, the trial being without a jury, it was conceded by the plaintiffs' counsel that the only proper notice of dishonour given to the defendant was as to the first note for £1,625 sterling. There cannot be any doubt, I think, that proper notices were not given as to the other three notes. In my opinion the giving of time to George K. McLeod is clearly established by his evidence. The defence then to the first note for £1,625 is first, want of due notice of dishonour; second, that the plaintiffs gave

time to the drawer of the note; and the third, payment. I think that there was sufficient notice of dishonour as to the first note; that there is no evidence of the payment of this note; and that time was given to the maker George K. McLeod for the payment of this note, and thereby the endorser was discharged. This is clearly established by the evidence of George K. McLeod, and is in no way answered by the evidence of John Fleming taken under commission to London, England. George K. McLeod says that the defendant had no interest in the arrangement made with Robinson, Fleming & Co. for advances. William H. McLeod, the defendant, was accommodation endorser.

Without writing down questions and answers I shall state what George K. McLeod says as to the giving of time, as follows:—"I went to London in November, 1898, in connection with this matter and other matters, and I called on Robinson, Fleming & Co. We discussed matters and they asked me to make them a proposition, which I did on the 12th of December, 1898. (This letter is in evidence.) They received the letter, and I saw them after that, and in conversation they objected to reduction from the £3,250 of amount paid since November, 1896. My conversation was with John Fleming. Nothing definite was decided at that interview. I went in again at their request, saw Mr. George Fleming, told him I was in their hands and I would accept their terms, and time to be extended to the autumn of 1900, but not reducing the amount of £3,250 by the amount which had come in since November, 1896. This was agreed on. This was two years after the last of these notes had become due. That included whatever liability there might have been on the part of William H. McLeod on these notes. That was in final settlement of everything. There was no answer to the letter of the 12th December, 1898. I had a letter from John or George Fleming drawing my attention to the fact that they would not consent to reduce the items. Eventually and verbally I consented. They agreed to the terms of my letter of 12th December, 1898, with the exception of the clause which reads, 'Any amounts which have been paid to you from any of the securities held by you for my account, and since 1st November, 1896, to be credited to me in reduction of the said sum of £3,250.' " The remainder of this letter dated at London, 12th December, 1898, is as follows:—"Messrs. Robinson,

Fleming & Co., London: Dear Sirs,—In accordance with our several conversations in regard to a settlement of my account with you I beg to state that I will accept the terms proposed by you, viz.:—I am to pay you the sum of £3,250 sterling with interest at 4 per cent. from 1st November, 1896, in full and final settlement of indebtedness to your firm of my brother and myself.” (Then comes the part not agreed to, and the letter goes on): “The properties in New Brunswick which are mortgaged to you are to be sold at public or private sale during the summer of 1899 and proceeds of such sale are to be paid to you in reduction of sum stated above. You are to instruct your representatives in Canada to afford every reasonable facility for the discharge of the mortgages on the different properties in order to give title to purchasers. You will agree to give me an extended time for payment of sum agreed upon until 21st December, 1900, by which date this settlement is to be finally completed by me. If you will kindly confirm the terms as herein stated you will oblige me.” Also, the witness (George K. McLeod) in answer to the question, “After all these notes were due you gave your own note for these four notes,” said, “I gave demand note to Mr. Coster at the time I gave the deed of the property.”

From the foregoing evidence there cannot be a doubt that there was a giving of time by Robinson, Fleming & Co., for the payment of these notes and that the defendant is thereby discharged. See *Bedell v. Eaton*, 4 N. B. R. 217; and *Devanney v. Brownlee*, 8 Ont. A. R. 355, as to the effect of the giving of time.

I have looked carefully through the evidence of John Fleming taken under commission, and do not see that on the point of giving time it in any way conflicts with the evidence of George K. McLeod. It was urged on behalf of the plaintiff that the defendant was a primary debtor, but there is no evidence to that effect; and George K. McLeod says that he was an accommodation endorser on these notes.

The verdict must be entered for the defendant.

A motion to set aside this judgment and to enter judgment for the plaintiffs, or for a new trial, was argued in

Easter Term, 1906, before TUCK, C.J., LANDRY, McLEOD, and GREGORY, JJ.

TUCK, C.J.:—This case was tried before me without a jury, when I gave judgment in favour of the defendant. Application was made here for a new trial upon a ground which was not taken before the Court below.

The action, if I remember aright, is on four bills of exchange, which were drawn by Robinson, Fleming & Company, at that time on George K. McLeod, and endorsed by William H. McLeod, for a large sum of money, amounting to thousands of pounds, and the defence set up to the action brought on these different bills against William H. McLeod, was first, that the time had been given by the drawers of the bills, who were entitled to the payment of the money, to George K. McLeod, and therefore that the endorser was discharged, and another ground was, in relation to all the bills, that no sufficient notice of dishonour was given the endorser.

The notices in all the cases went first to Mr. Deacon, the accountant or manager of what was then the Merchants' Bank of Halifax, now the Royal Bank of Canada, and through him they were sent to Mr. McLeod, who lived in Richibucto.

It was admitted on the trial by Mr. Coster, who appeared on the part of the plaintiffs, that the notices in three cases were not sufficient, and I agreed with that; but that as regards the first case, the notice sent and received by William H. McLeod was sufficient notice of dishonour within the time. They seem to have had the idea in England that it was only through ships running directly to Canada that a notice could be sent. In these different cases, and certainly in the three cases, they waited until a ship was about to leave from England directly for Canada, at that time either on Thursday or Saturday, and allowed two or three days to elapse between the time the notes became due and the time when the steamer would sail, and then they sent them, instead of directly to Mr. McLeod, to Mr. Deacon. I do not know whether that was right or wrong, but there was delay in sending them and it was agreed on the trial before me that these notices were not sufficient, but as regards the first it was contended there was no delay and notice was good and sufficient.

Then a change took place in the counsel and the matter came before this Court upon an argument never brought before me at all, namely, that there was no consideration for the time which was alleged to have been given. There is no doubt time was given, but the argument made before this Court was that in order to make that defence a good one there should have been consideration for the time.

Then it was also argued on the other side by the defendant's counsel that even if that was true as to the question of consideration it only applied to the first bill of exchange and that had been paid.

I think the evidence of George K. McLeod shows the first bill had been paid and that there was sufficient consideration for the time that was given, that security was given, payment was made, and that that payment which was made by means of this security which was given was a payment on the first note, and that therefore that was a consideration because of the security that was given; but if that is not sufficient then upon the other ground that this note, of which a sufficient notice of dishonour was given, had been paid. Therefore I think that this application for a new trial fails and that the verdict given before me, though unjustifiable on the merits, must stand. The question of consideration for the time given was never taken below; but even supposing it had been and that the defendant is entirely within his rights to take that point now, it fails for the reasons I give here.

LANDRY, J.:—I had some hesitation in arriving at the conclusion that the judgment should not be disturbed, but the Chief Justice having heard all the evidence and having concluded that the first note was paid, I have yielded to his opinion, because he had a better opportunity of judging of these facts than I have had, and I agree.

GREGORY, J.:—I agree with the learned Chief Justice that this judgment should not be disturbed, and the judgment given by him on the trial of the case forms part of the matter upon which I conclude this.

McLEOD, J., took no part.

NOVA SCOTIA.

FULL COURT.

DECEMBER 22ND, 1906.

STAMPER v. RHINDRESS.

Medicine and Surgery—Malpractice—Negligence—Failure to Detect Dislocation.

Appeal from the judgment of MEAGHER, J., in favour of plaintiff, argued before TOWNSHEND, J., GRAHAM, E.J., RUSSELL, and LONGLEY, JJ.

Attorney-General of Nova Scotia (Drysdale, K.C.), for the appellant.

R. H. Butts, contra.

GRAHAM, E.J.:—This is an action brought for negligence against three medical practitioners. The plaintiff fell a distance of some forty-nine feet on a heap of iron ore, striking a plank and the ore. Some of his ribs were fractured, one hip was dislocated, and it was found out afterwards that the other one was, although this was not known at that time. The three defendants attended and reduced the right hip, examined the left hip and saw no evidence of dislocation. Dr. Rhindress says: "Q. I want to find out what examination you made of the patient and find out particularly as regards the left hip as to whether it was dislocated? A. I examined his left hip when he was under chloroform the first time. I examined it by comparing it with the opposite hip and comparing the position of the limb with the position of the reduced limb, both as to the length and general position of it. Q. Did you manipulate the hip to ascertain whether there was any dislocation or not? A. Yes, I made an examination of the leg and hip and then the patient was bandaged. Q. How did you find the relative lengths of the legs? A. They compared exactly one with the other. I flexed the leg and moved the leg towards the right leg, and away from it, and flexed and extended it. I did not detect any grating sound. After that Dr. McLean bandaged him. Q. What is your best judgment as to whether the hip was out at that time? A. My best judgment is that it was not out at that time; that

there was no serious injury to the left hip that I could discover. Having come to that conclusion, Dr. Maclean bandaged Stamper's legs and we returned him to bed. I do not recollect particularly how he was bandaged. Maclean did that part of it, and I don't recollect where he placed the bandages. My impression is that he placed them round his knees."

Four or five days after the accident, the attention of one of them was called to the left hip, that something was wrong with it. He was suffering from it. All three attended and placed the defendant on a table for examination. His limbs were measured and a shortening was detected, but the plaintiff informed them of a permanent shortening which a former doctor, Clay, had told him of. He was stood on the floor, one on either side and examination was made, and they say that there was nothing to indicate a dislocation.

Two days afterwards, when Dr. Smith was in attendance, the plaintiff called his attention again to his left hip. He moved his leg two or three times and Dr. Smith heard a noise like a click. Dr. Smith went to the other doctors and told them that there was something wrong with the left hip, and that he had heard it. They returned and the movement was repeated and this noise was heard. They came to the conclusion that it was dislocated, or at least that there was something wrong, probably dislocation. That was in the evening, and as they had to administer chloroform, they decided to attend again in the morning. Next morning chloroform was administered and the dislocation was reduced. They heard the noise of the bone going into its place, and on investigation were satisfied that it was in place.

Dr. Maclean applied three bandages, one at the ankle, one above the knee, and one at the hip. The patient was put to bed and Dr. Maclean gave directions that he was not to be moved out of bed, but was to use a bed pan. The hip remained in place for four or five days. It appears that physic had to be administered, and was administered by Dr. Smith, and that the patient would not use a bed pan. When the men were lifting him into bed the fourth time, the hip came out again. In the morning all three defendants were returning to reduce the dislocation, and Dr. Smith was already there when Dr. Love, another medi-

cal man who had been summoned by the patient, met him. The other two, in consequence of this, withdrew from the case, no blame being attached to them for taking that course, and Dr. Love and Dr. Smith reduced the dislocation. Then Dr. Love, who had been informed of the history of the case, and made an examination, said he was afraid that there was a fracture of the rim of the cup or socket. The expert, Dr. McKeen, says that that must remain a theory, that it is inferential, and while the circumstances would be suspicious no one could be sure of it without the X-rays. I assume that there was a fracture and that Dr. Love's diagnosis was correct.

After the reduction, Dr. Smith continued to attend him and attended two or three times a day for a couple of weeks or more.

The charge of negligence (it is a joint tort of course), is that these three defendants should have discovered as the result of their consultations that there was a fracture, and should have put on a splint as Dr. Love did, and soon at least have relieved him of the pain.

I think the case is not to be judged by comparisons of doctors, one acting before and another after the event. Dr. Love, however, had one indication of fracture which the defendants had not. At the last time of their actual attendance, they only knew of the hip being out once, and of its being reduced then. It had been out twice when Dr. Love was summoned. Of course unless they saw that it was out there was nothing to indicate fracture. So that on the first and second occasions there was no reason to suspect its existence. It could not be discovered by feeling it. The edge of the cup, owing to the muscular and other covering, does not admit of this simple means. There was no crepitation; at least they noticed none. It is contended, however, not by medical men, that they should have discovered it after at least the third occasion, because when the hip did go in it went in too easily, and secondly, that with the assumed one-eighth inch of the rim broken, the drop into the cup when it went into place would take a shorter time than it otherwise would.

About the circumstances under which it went into place on that occasion, the facts are these: Dr. Rhindress says: "Next day we gave chloroform and almost immediately on

taking hold of the leg we heard a noise such as is heard when that bone goes into place."

Later, about the noise, he says: "Q. Did you ever hear a noise of that kind before in a man's hip, or is there anything to which you could attribute that noise? A. It was not a gritting noise. If I were asked to describe it, I should say it sounded like the head of the bone dropping or being moved from one place to another and striking against something soft, perhaps covering muscle. Q. Could the head of the bone be moved in that way if there was no dislocation? A. Not to make this noise, no."

Dr. Maclean says: "Dr. Rhindress took hold of the foot, and I was going to manipulate the joint, and before I got quite into the way of holding it the dislocation was reduced, no trouble about it."

Then as to the medical opinions on these circumstances.

Dr. McKeen, one of the plaintiff's experts, says: "Q. The fact of Dr. Smith finding that the ball and socket would work so easily back and forth, would not that lead you to suppose there was a fracture? A. No. Q. Without this noise or the friction going in and coming out of the ball, is there anything else from which a doctor could infer that there was a fracture of the rim of the cup? A. Nothing. Q. After the dislocation is reduced, you say there is nothing from mere surface examination or feeling from which you could discover it? A. Nothing whatever."

And take the evidence of another of the plaintiff's experts. Dr. Johnston says: "A dislocation with a fracture I should think a splint would be advisable." And in cross-examination: "Q. If you had been treating this man and put the right hip in place and it set all right, would you think it necessary to put a splint on the hip? A. If I discovered a fracture; if not, I would not think of putting a splint on. Q. If the bone slipped into its place without making this noise, is there anything else by which you could possibly discover that break in the cup? A. I don't think so. Q. You would not look for a break? A. No. Once reduced and then coming out again would make me suspicious that there was a complication or a fracture. When I came to it a second time, I would take all precautions necessary."

And the plaintiff's other expert witness, Dr. McLeod, says in cross-examination: "Q. In the reduction for the first time of a dislocation, would you consider it necessary to put this splint on? A. Not for the first time. Not in the first instance. Q. You say, then, that it is only after you discover that the hip persists in coming out that you would think it necessary? A. To take extra precaution, yes. Q. I am told they only reduced the dislocation of the left hip once—what would you say if they did not on the first reduction of the dislocation, and in their experience it did not come out at all, what would you say of their treatment in not putting on this board at all? A. I would say it is as much as would be expected of them at that stage. Q. You would not consider it necessary to put a board on the left any more than on the right at that time? A. No, not at that time."

Dr. Love says: "I heard no crepitation. I felt a trembling in the limb as the head of the bone was slipping over the rough surface. It could be clearly felt."

And in cross-examination he says: "Q. If that socket was in place would there be anything to indicate to you that there was a break in the rim of the cup? I mean if the head of the bone was in and you came and made an examination, would there be anything to indicate to you that there was a break in the rim? A. Nothing. Q. The only thing that would suggest it to you was the readiness with which it came in and out? A. The reducing and the feeling that it gave and the amount of drop that the bone had to get down in the socket. Q. How much of a break would you say there was off the cup? A. It is very difficult for me to say just the exact amount, but I said I thought it would be from one-half to three-quarters of an inch; it might be one-eighth more or less. Q. In reducing that dislocation, was it possible for that bone to go into its place without passing over the rough surface where the break was? A. It was quite possible; I might have been reducing the dislocation, and if the head was further up I might have tried to get the limb in over the place that was not broken. It depends upon the position the head was as to the break. Q. If it had passed in on the surface where there was no break, the grating noise or vibration would not take place? A. No. Q. There would be nothing to indicate to you that there was a break at all? A. No. Q. You also say that

the distance of the drop of the ball into the socket helped you to conclude that there was a part of the rim off? A. Yes. Q. Supposing from the length of time this ball was out some matter had formed in the bottom of the socket, would that account for the shortness of the drop to some extent? A. It would to some extent. Q. If you had no grating noise, would you conclude from the drop alone that there was a break? A. No, it was a combination of these symptoms that led me to the conclusion. I tried to ascertain if I could dislocate it by pushing the leg upward, and I could not put it out that way. I was trying to ascertain just the amount of rim broken off, and I pushed it upward and it remained solid and would not go out that way. It would not go out until I had the leg flexed."

When he later gives his opinion on the case, it must be remembered that Dr. Love had never had a case before of fracture of the cup, and but three cases of dislocation of the hip.

I will not refer to the other testimony of the defendants or their experts on this point, because I think sufficient has been quoted from that of the plaintiff's own witnesses to displace the legal contention.

The plaintiff had four medical men on the witness stand—two of them as experts. The defendants, besides their own testimony, adduced the evidence of three medical experts. And I have failed to find in all of the testimony anything done, or left undone, by these defendants which would have enabled them to have diagnosed this fracture. None of them suggest that it should have been discovered from the data which the defendants had. And when a plaintiff cannot get at least one expert to express from the facts presented to the defendants an opinion unfavourable to the defendants' treatment, he can hardly expect a Court to come to that conclusion. Dr. Love had the opportunity to give that unfavourable opinion. This was the question and note the answer: "Q. In a case of this kind, you say it could be readily ascertained by the use of reasonable care on the part of the medical attendants? A. I reduced that through the fracture. The head of the bone went in over the head of the broken rim. There was a gap in the bone and the head went in through that. Had the leg been in some other position when I manipulated and the head came up on the sound part of the rim, it might have dropped down

into its position, and I might not have noticed because I would not have had crepitation then."

In my opinion, there is no evidence of negligence on the part of these defendants.

The appeal should be allowed and the action dismissed.

TOWNSHEND, and RUSSELL, JJ., concurred.

LONGLEY, J., read a judgment reaching the same conclusion.

NOVA SCOTIA.

FULL COURT.

DECEMBER 22ND, 1906.

THOMPSON v. CAMERON.

Sale of Goods—Specific Article—Defect—Acceptance—Evidence—Warranty—Damages.

Appeal from the judgment of WALLACE, Co.J., in favour of plaintiff, in an action for the price of a cash register, argued before GRAHAM, E.J., MEAGHER, RUSSELL, and LONGLEY, JJ.

W. F. O'Connor, for appellant.

G. H. Parsons, for respondent.

RUSSELL, J.:—The defendant ordered from the plaintiff a No. 2 total adding century cash register, for which he paid ten dollars in cash, and undertook to pay five dollars a month until the full amount of the price was paid. The learned County Court Judge has found that the machine delivered did not contain a device which the defendant in ordering it regarded as essential, and that the machine was found to be defective in its operation and unreliable as a cash register. The defendant wrote a letter to the agent of the plaintiff the day after the receipt of the machine, stating that the article delivered was not the one ordered and was not in a workable condition, and in a letter written ten days later, he requested the agent to remove the register from

the store, and notified him that he would not accept any other machine in performance of the plaintiff's contract. But the defendant continued to use the machine in his store, and it was on his counter in use from the date of its delivery in December, 1904, down to March, 1906. The learned Judge accepts the statement of the defendant that the machine was only used as a money box or drawer for cash, and that he did not rely on it as a cash register. But there is evidence that the use of the machine was not simply of this restricted nature. This evidence related to acts of the defendant after the issue of the writ, and it is contended that it cannot for this reason affect the issue. But the question is one as to the intention with which the defendant retained and used the machine, and the construction to be put upon his acts, and I am not so sure that his conduct after the issue of the writ might not have the same evidential value as his conduct before the action brought. The rights of the parties, it may well be, were fixed at the date of the action brought, but an admission of any kind made by him afterwards would certainly be admissible evidence, and I see no reason why his subsequent conduct might not be equally relevant to shew the light in which he regarded the transaction, and to negative the effect of his repudiation of liability by the letters written shortly after the delivery of the machine.

But whatever may be said as to the effect of the evidential value of the fact that the machine was used as a cash register after the bringing of the action, I am of the opinion that the defendant could not use it even as a cash box from December, 1904, until April, 1905, when the writ was issued, and still claim the right to reject the machine as not fulfilling the contract. The case of *Chapman v. Morton*, 11 M. & W., is distinguishable from this case on the facts, but the difference is only one of degree. The conduct of the purchaser in that case was a little more inconsistent with the recognition of a property in the seller than the acts of the purchaser in this case, but the language of Lord Abinger in that case is directly in point here: "We must judge of men's intentions by their acts and not by expressions in letters which are contrary to their acts." The defendant seems, as in the case cited, to have "exposed himself to the imputation of playing fast and loose, declaring in his letters that he will not accept the goods, but

at the same time,"—not it is true as in the case of *Chapman v. Morton*, "preventing the plaintiffs from dealing with them as theirs,"—but "doing acts in relation to them which were inconsistent with the ownership of the seller," which under the law as codified in the Sale of Goods Act (s. 35) has the same legal effect.

The defendant contends, however, that even if he had precluded himself from rejecting the article supplied in the performance of the contract, he is entitled to an abatement from the price because of the defects in the machine. It may well be that if there had been a warranty given with the sale, the purchaser would not have been precluded by his acceptance from claiming damages for the breach of the warranty, but no case was cited at the argument in which the question was raised as to the effect of accepting an article which does not correspond with the description of the article sold in the absence of some warranty express or implied, other than the implied condition that the goods shall correspond to the description. The New York cases treat this question with scientific precision. In the case of *Studer v. Bleistein*, 5 L. R. A., the New York Court of Appeals holds that "an acceptance by the vendee of personal property manufactured under an executory contract of sale after full and fair opportunity of inspection, in the absence of fraud, estops him from thereafter raising any objection as to visible defects and imperfections, whether discovered or not, unless such delivery and acceptance are accompanied by some warranty of quality manifestly intended to survive the acceptance," and further that "words descriptive of the property to be manufactured under such contract which refer only to those qualities which are readily discernible upon inspection, and which are not collateral to, but are a necessary part of the contract of sale, will not support the inference that any warranty was intended which will survive the acceptance of the property." The notes to this case and the case of *Copley Iron Co. v. Pope*, 108 N. Y. 232, furnish numerous illustrations of this principle, and shew that it is not confined to the case of a contract with a manufacturer, but extends to every case in which there is not some warranty in the strict sense of the term,—some stipulation collateral to the contract of sale. The doctrine of these cases seems to me to be very reasonable. I suppose it is founded on the consideration

that if the buyer had rejected the article in toto, the vendor might have found a purchaser willing to take it at the price contracted for, and the buyer who waives his right to reject is for the reason precluded from claiming damages for the inferiority of the goods supplied. There was no warranty in this case that I can find. The use of such a term in connection with the contract in question would be the very fallacy pointed out by Lord Abinger in *Chanter v. Hopkins*, and if the doctrine of the New York cases applied, I would have to hold that the defendant was without remedy. But the editors of the latest edition of *Benjamin on Sales* plainly indicate that the New York doctrine is different from that of the English Courts, and in speaking of the purchaser's rights, they make no difference whatever between the breach of a warranty in the strict sense of the term, and the failure to supply goods conformable to the description by which they are sold. I doubt if the matter has ever been as carefully thought out by the English Courts as it has by those of New York, and the States, of which there are several, that have adopted the New York rule. But I must accept the statement of Mr. Benjamin's editors as to the effect of the English cases, and hold that as the plaintiff's contract in this case was broken, he can only recover the actual value of the article supplied. Whether this result proceeds upon the theory of a new implied contract, or upon the footing of damages in this way awarded to the defendant for the breach of an implied condition which on the passing of the property has sunk to the level of a warranty, is immaterial. The appeal must be allowed with costs, and as we have no data for assessing the value of the machine there must be a new trial.

GRAHAM, E.J. (after stating the facts):—In *Benjamin on Sales*, p. 624, it is said: "Where a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied."

I know of no principle which prevents the defendant from recovering damages for the breach of that implied

warranty. I think he is also entitled to have the price of the article reduced by the amount of those damages: *Mondel v. Steel*, 8 M. & W. 858.

No distinction is made between an express warranty and an implied warranty in the application of this remedy in *Benjamin on Sales*.

The appeal will be allowed with costs and the case remitted to the County Court to reduce the plaintiff's claim in the manner indicated.

MEAGHER, J.:—I have prepared an opinion reaching the same conclusion. I think the damages below should be limited to the value of this article. Also that the plaintiff should pay the costs, inasmuch as the trial proved abortive through his failure to give evidence which would have enabled us to give judgment without the necessity of sending the case back. The new trial should be confined to the one question of the value of the article in the condition in which it was.

LONGLEY, J., concurred.

NOVA SCOTIA.

FULL COURT.

DECEMBER 22ND, 1906.

OGILVIE v. GRANT.

Deed—Description — Appurtenances — Evidence — Grantor's Statement of what He Intended to Convey—Surrounding Circumstances—Mode of User—Oral Agreement to Divide Land—Limitation of Actions — Possessory Title — Wild Lot—Isolated Acts.

Appeal by defendants from the judgment of Longley, J., 1 E. L. R. 117, argued before TOWNSHEND, J., GRAHAM, E.J., MEAGHER, and RUSSELL, JJ.

W. B. A. Ritchie, K.C., for appellant.

F. H. Bell, and R. T. Macilreith, for respondent.

TOWNSHEND, J.:—The facts of this case are so fully stated in the decision appealed from that it is quite un-

necessary to recapitulate them except in so far as required to make clear the reasons for my judgment. Both parties claim the so-called James Ogilvie lot under Peter Ogilvie. The plaintiff asserts title under two conveyances: (1) a deed from Peter Ogilvie dated 7th November, 1857, conveying to him one full half or moiety of certain lands; (2) a deed dated 1st October, 1863, conveying the other half of same lands. The description in each is substantially the same. In the 1857 deed the lands and property conveyed are as follows: "The following tract of land situate lying and being at Musquodoboit aforesaid, that is to say, one full half or moiety of the farm lot on which the said Peter Ogilvie now resides, with one full half of the buildings thereon, and also one full half or moiety of the whole of the personal estate of the said Peter Ogilvie which he now owns or possesses, together with the full half or moiety of all the woods, ways, waters, watercourses, commodities, hereditaments and appurtenances thereunto in any wise belonging or appertaining, etc., etc. To have and to hold the said full half or moiety of the said farm lot, and also the full half or moiety of the said personal estate," etc.

In the 1863 deed he conveyed "the other half of the farm on which he, Peter Ogilvie, resides, with one-half of the buildings thereon," etc., etc.

On the 12th June, 1863, Peter Ogilvie conveyed to his sons Alexander and Samuel "all my right, title, claim, property and demand unto or upon a certain piece of land granted to James Ogilvie my brother," describing the lot by metes and bounds. This is the lot in dispute, and defendants claim and justify under title received from these two brothers.

The whole difficulty has arisen from the general description or want of description in the deeds plaintiff received from his father, Peter Ogilvie.

The vagueness of description in plaintiff's deeds compels us to resort to extrinsic evidence to ascertain not what Peter Ogilvie said he intended to convey to his son William, but applying the words used to the subject matter, what they do convey.

The farm lot on which Peter Ogilvie resided was a part of a lot granted to John Story. Peter Ogilvie purchased the whole of the Story lot, on part of which he resided

during his lifetime, and built his house and other farm buildings. Subsequently he conveyed portions of it to other sons, retaining his house and buildings and about 80 acres of cleared land, a mill lot, and a wood lot containing about 75 acres at the north end of the Story grant. In addition to this, he owned the land in dispute, which was also a wood lot, situate about two miles from the farm lot, and approached by a road used in common by himself and other people, between which and his farm lot intervened several other proprietors.

Plaintiff claims that under the words in his deed "together with one half of all the woods, ways, waters, water-courses, commodities, hereditaments and appurtenances thereunto belonging or appertaining," he became entitled to one half of the lot in dispute. Dealing first with this contention, it seems clear that the James Ogilvie lot was not a part of the farm lot, and therefore did not pass by that description. It was a distinct and separate piece of land, and in his conveyance the grantor says: "The farm lot on which the said Peter Ogilvie now resides." This lot as already pointed out lay some two miles distant. Then on a well-known principle of law, it would not pass under the words, "woods," etc., for land cannot be appurtenant to land. Next, it is argued that in defining what constituted his farm lot, we must apply the words to woods generally used with the farm lot, and adopting that method of interpretation, I cannot find enough in the evidence to justify the conclusion that the lot in dispute was generally used by Peter Ogilvie in connection with his farm as a wood lot, while there is evidence to shew that the wood lot retained out of the John Story grant was so used. There can be no doubt that the language of the deed would be satisfied by applying it to the latter. It is true, from time to time he got wood or lumber off the James Ogilvie lot for his mill, as he had the right to do, and the plaintiff after he got his deed did the same, but there was no general user as part and parcel of the farm. The legal principles which govern the interpretation of deeds, such as we have in this case, will be found expanded in Norton on Deeds, pp. 252, 253. The utmost which could be urged in plaintiff's favour in this regard is that the context may shew that the word "appurtenances" or other equivalent expression, is used in a secondary sense of "usually held or enjoyed therewith."

The evidence in this case, as already pointed out, fails to shew that such was the fact. On the other hand, the evidence does demonstrate that the wood lot part of the Story lot was so used, and that it passed under the deed to plaintiff. Pollock, C.B., in *Maitland v. Mackinnon*, 1 H. & C. 607, said that the land to pass under such words as "appurtenances," etc., must necessarily be a part of the premises "as for instance a front area." It in fact must be an integral part of the farm when spoken of as such.

The learned trial Judge, against the objection of defendants' counsel, received evidence of the grantor's (Peter Ogilvie) statements to the plaintiff as to the land he intended to convey, or thought he had conveyed to him, and on such evidence has to a considerable extent based his decision. He refers to *Roe v. Selden*, 22 Q. B. D. 233, and *Gerrish v. Towne*, 3 Gray 82, as authorities for the admission of such parol evidence. An examination of those cases will shew that they in no respect differ from the well established rules in respect to the admission of parol evidence of the intention of the parties to a deed: (Reference to *Shore v. Wilson*, 9 Cl. & F. 355, at p. 555).

Authorities without number might be cited to illustrate this very well settled rule of law.

Where the words used are ambiguous, no doubt parol evidence may be given of the surrounding circumstances attending the execution of the deed to enable the Court to interpret the language, but not what the parties say themselves they intend. In this case there is ambiguity as to what was included in the word "farm lot," and as to what was appurtenant, and so far as the evidence of user was received there could be no objection. The learned Judge, however, was clearly in error when he allowed declarations of the grantor Peter Ogilvie as to what he meant to convey to be given in evidence or any declarations on that subject made by the grantor. In summarizing the ground on which he decides the Judge says: "That at or shortly after the deed William says Peter took him over the land and pointed out to him what he had, and what was conveyed to him, and in doing so he took him over the James Ogilvie lot, and pointed out the boundaries to him, and indicated this as a part of the land which he was receiving a moiety of."

As I have already shewn, the learned Judge, in adopting this view, was entirely in error, and misapprehended the cases cited to support that ground of his decision.

With the exclusion of parol evidence of this character, nothing remains to indicate that the James Ogilvie lot was then or at any other time used with, or regarded as a part of the farm on which he resided, or appurtenant thereto. On the other hand, the fact that Peter Ogilvie in June, 1863, conveyed to his sons Alexander and Samuel what purported to be his whole title and interest in the James Ogilvie lot, not one-half or moiety, is some evidence to shew that it could not have been included in plaintiff's deed in 1857. But when we examine plaintiff's second deed, dated 1st October, 1863, it is found that it expressly describes what he is then conveying as "the other half of the farm on which he, Peter Ogilvie, resides, . . . meaning all the real and personal property attached to said farm and in possession of said Peter Ogilvie." In the sentence immediately preceding this description is this recital: "Now be it understood that one-half of all this lot of land on which Peter Ogilvie before mentioned resides, including one-half of all personal property, buildings, ways, woods, waters, watercourses, commodities and appurtenances thereto in any wise belonging or appertaining was conveyed by deed by Peter Ogilvie aforesaid, which deed bears date November 7th, 1857." From this it is very evident that in his first deed he conveyed and meant to convey nothing more than one-half of the farm lot and woods appurtenant or attached as more definitely fixed in the second deed. As plaintiff accepted and holds his title in part under the latter deed, it is at any rate an admission of the extent of his land held under both.

A further ground of decision is the alleged division between Alexander and plaintiff of the James Ogilvie lot. It is not necessary to dwell upon this reason at any great length. It is not sufficient to point out that assuming, as I have demonstrated, that William acquired no title from Peter Ogilvie, and that Alexander and Samuel, did, any agreement between William and Alexander for the division of the lot could not pass any title under Alexander to William. Whether done under a misapprehension of their respective rights in the lot or not is immaterial. Land cannot be transferred by verbal agreement, and as for the doc-

trine of conventional agreement for the settlement of disputed boundaries it has no application to such a case as this. So, too, it is utterly beside the question to hold that because Samuel, one of the grantees of the James Ogilvie lot, swore that he always believed that William owned one-half of the Story lot, that is evidence of William's title. Such evidence should not have been received. The title to lands and the construction of deeds are not to be settled by the beliefs of witnesses.

One ground remains to be disposed of, that William acquired title by possession. The learned Judge says: "I believe William the plaintiff when he states the incidents of the division of 1870, and I think the evidence justifies me in finding that William has held possession of the half so allotted to him in the division." I have already shewn that the alleged division could in no way give title to William. The Statute of Frauds, R. S. N. S. c. 141, s. 4, enacts that "no interest in land shall be assigned, granted, or surrendered except by deed or note in writing." What therefore he did on this land in at times taking off lumber can only be regarded as so many trespasses, or, to put his acts at the highest, by leave and license. But William's acts on the lot were not of that continuous and uninterrupted character which would enable him to gain a title by possession to the one-half he claimed. While it is true he cut timber on the land for several years, there is no evidence that he continued for twenty successive years in doing so, and there is evidence that Alexander and those claiming under him were also cutting all over it. It is only necessary to refer to the numerous cases in our own Court to shew that much more is necessary than has been proved here to enable a title to a wilderness lot to be acquired by prescription. The learned trial Judge says that "William has claimed and enjoyed uninterrupted possession of his half until 1896," from the date of the agreement for division. With all respect, I must express my total dissent from this view of the evidence. The plaintiff's evidence is material on this point. He says: "I drew timber from there and sawed it on the mill lot—I am speaking of ten years" (this was after he got his deed) "I did not work steadily at it. Almost every year for ten years. I did not cut an average of 10,000 a year. I cut away one winter in the Ship Harbour woods. This was after the ten years. When I came

back I found there had been some cutting on the side of the lot while I was away. It was done by my brother Alexander." He then describes the agreement for a division. He continues: "After 1870 I kept the lot and attended to it. I was on it every year. I kept it for a wood lot. Sometimes I cut on it—sometimes I did not. I have cut about twelve cords of fire wood one year. It was the year Logan was on it. That is about 1896. That is the last wood I cut on it." On cross-examination, even the above acts are considerably qualified. "Q. Except for the frame, you did not take wood off until 1859 or 1860? A. I may have taken a load home. I most always took a load home when out there working. Q. For how many years were you sawing in that mill? A. For about fifteen years. The mill went down then. Q. Were you sawing in the mill every year from 1857 down? A. No, it was in 1859 when we commenced sawing." He further says: "I hauled timber to the mill in 1859 and sawed it the next year. I could not swear that the timber came off the James Ogilvie lot at that time, but it did for a number of years after." Thus it would appear from his own evidence that at the best he ceased to get lumber off this lot in 1874 or 1875, and the only other cutting proved was twelve cords of wood in 1896, an interval of over 20 years. The fact that he walked over it and looked at the blazed trees are not acts which will suffice to give him a possessory title. But to be weighed against this is the evidence of Samuel Burris, who got a sheriff's deed of the whole lot in February, 1890, and from that time up to the time of action made several sales to different parties, who went on to the lot cutting and hauling timber from it. Uhlman says: "In regard to the James Ogilvie lot since I got my deed I took wood off it and some logs; I was pretty well all over it. Since I purchased no one has cut to my knowledge except persons I have sent there. I did not cut the first year, but after that I cut every year up to the time of the agreement with Grant. I never paid the \$25." He further says plaintiff's claim was not on the wood lot—it was for another part of the property altogether. Arthur Killan says: "I was lumbering on the property fourteen years ago. I was working then for John Killan. We cut on different parts of the lot, both on the east and west sides. . . . I cut there for John Logan about ten years ago. I cut in different places over the wood lot. I know of Henry Grant working there. That was

after John Logan. He cut all over the lot. It was on the part William R. Ogilvie now claims.”

These are but a few extracts from the evidence which I have made in view of the very pronounced finding of the learned Judge that plaintiff's possession was uninterrupted. There is in addition to the same effect the evidence of Alonzo Grant and Joseph Grant, which in unmistakable terms shews that so far from plaintiff having uninterrupted possession, the contrary must have been true, and in my opinion there is ample to shew that under the circumstances there can be no pretence on the part of the plaintiff to claim title by exclusive acts of possession for the statutory period.

For these reasons I am of opinion that the decision of the learned Judge must be set aside, and judgment should be entered for defendants with costs of trial and of this appeal.

GRAHAM, E.J., read a judgment allowing the appeal with costs and dismissing the action.

MEAGHER, and RUSSELL, JJ., concurred.

NOVA SCOTIA.

FULL COURT.

DECEMBER 22ND, 1906.

SMITH v. FRAME.

Promissory Note—Consideration—Note Given for Balance of Previous Judgment—Duress—Note Given to Avoid Imprisonment as Judgment Debtor—Collection Act—Order for Payment against Dominion Civil Servant.

Appeal by the defendant from the judgment of TOWNSEND, J., 2 E. L. R. 63, argued before GRAHAM, E.J., MEAGHER, and RUSSELL, JJ.

J. T. Ross, for appellant.

A. Whitman, and J. Oakes, for respondents.

GRAHAM, E.J.:—This is an action on a promissory note, made the 20th January, 1906, for \$1,469.66, payable on demand with interest. The defence raised is that the note

is (1) without consideration, and (2) was made under circumstances which amount to duress.

It appears that the plaintiffs recovered judgment against the defendant and one George S. Frame as far back as the 9th November, 1896, for \$1,721.46 debt, and \$58.25 costs. On the 16th December, 1896, a commissioner of this Court under the Collection Act made an order against the defendant (after an examination) for the payment of the judgment debt by instalments of \$10 per month. It appeared that the defendant at that time was in receipt of a salary from the Dominion Government of \$1,000 per annum as Inspector of Weights and Measures and that he had one child eight years old dependent upon him. On the 5th November, 1891, he had assigned his property to his creditors, and some of them discharged him from their claims. It did not appear whether the assignee has disposed of the property.

The defendant complied with the commissioner's order, paying the instalments from January, 1897, to the 1st May, 1905, but after that date failed to pay them. The plaintiffs, under the Collection Act, upon the 12th January, 1906, for this default obtained an order for an execution to take the body. The execution was issued, the defendant arrested and on petition, under the Judgment Debtors Act, he applied to a Judge of this Court for his discharge. The examination under that Act took place the 19th January, 1906, and it was adjourned to the 20th for further consideration and the debtor remanded.

Thereupon, on the recommendation of the learned Judge in favour of some settlement, the defendant gave the note in question. In all cases the plaintiff is entitled to an assignment by the debtor of all his effects, but instead the plaintiffs took this note and the Judge made this minute: "The defendant is hereby discharged, January 20th, 1906, upon an arrangement being made between the parties."

(1) I am of opinion that there was a consideration for the making of the note. Under the Bills of Exchange Act, s. 27, s.-s. (b), an antecedent debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time.

There was a forbearance in respect to the judgment and to asking for a remand.

In *Alliance Bank v. Broom*, 2 Dr. & Sm. 292, the Vice-Chancellor said: "It appears to me that when the plaintiffs

demanding payment of this debt, and, in consequence of that application, the defendant agreed to give certain security, although there was no promise on the part of the plaintiffs to abstain for any certain time from suing for the debt, the effect was that the plaintiffs did in effect give and the defendant received the benefit of some degree of forbearance, not indeed for any definite time, but at all events some extent of forbearance. . . . It is very true that at any time after the promise the creditor might have insisted on payment of his debt and have brought an action, but the circumstances necessarily involve the benefit to the debtor of a certain amount of forbearance which he would not have derived if he had not made the agreement."

I refer also to *Conrad v. Corkum*, 35 N. S. R. 288; *Crears v. Hunter*, 19 Q. B. D. 341; *Creelman v. Stewart*, 28 N. S. R. 187; *Beer v. McLeod*, 22 N. S. R. 535.

The fact that this debt was a judgment debt in respect to which the note was given does not prevent it from constituting consideration. The temporary suspension of enforcing it which is involved as indicated by the cases already cited is sufficient: *Baker v. Wallace*, 14 M. & W. 465.

There was really a compromise here which took place on the recommendation of the Judge and forbearance on the part of the plaintiffs to press for a remand under the Act. The validity of this contention depends of course upon the next question.

(2) I am of opinion that the note was not illegal for duress or other cause. The argument involves a collateral attack on the order which the commissioner made for payment by instalments away back in 1896. And it is said that this order was void (and consequently the order for the execution to arrest for non-payment, both appealable orders) because the defendant was a salaried officer of the Government of Canada, and that the order for payment of instalments would encroach upon that salary. And therefore that the arrest was invalid and constituted duress, and that the giving of a note under the circumstances was illegal.

It has been held by this Court, in *McKay v. Hamilton*, 36 N. S. R. 522, that prohibition (and consequently certiorari), will not go to an officer acting under the Collection Act in Supreme Court judgments, as the proceedings are in this Court. It is necessary for the defendant to maintain that these orders were absolutely void. With an appeal afforded and a long acquiescence by payment of the instalments and

a petition by himself invoking the jurisdiction to be discharged under the Judgment Debtors' Act, when the note in question was made by way of compromise, there must be a state of things which the defendant could not waive and this requires absolute nullity. The defendant was not ignorant of his rights in respect to his government salary, for his counsel took the point in 1896 when he was examined before the commissioner.

I am of opinion that the order of the commissioner was not a nullity. The salary was \$1,000, and the instalments would amount to \$120 in the year.

The provision of the Collection Act, R. S. N. S. c. 132, s. 27, is as follows: "When upon the examination it appears to the examiner that he is possessed of means or income sufficient therefor he may make an order requiring him to pay the amount due on the judgment by instalments."

There is no statutory provision in force in Nova Scotia which expressly protects the salary of government officials.

There must be many cases where the salary is so large and there may be other means, and the debt or the proposed instalments so small, that the usefulness of the government officials would not be impaired by an order. It can hardly be the case that an officer, because he has a salary is to be exempt from the payment of debts. I think at least that the examiner may take into consideration whether or not the consequences of the instalment order will impair the usefulness to the Crown of the official. That would involve a question of fact. In Nova Scotia the imprisonment is not for a fixed time as in England, but the debtor may immediately obtain his discharge under the Indigent Debtors' Act, provided, of course, there has been no fraud.

There is a case in the Court of Appeal for Ireland which has reasons in favor of this order made by the examiner. In *Hamilton v. Coningham*, [1903] 2 Ir. 564, it was held that a committal order for default in payment of an instalment of a judgment debt, ordered to be paid by the judgment debtor by instalments, will be granted against the debtor though he is an officer in the army and the only income of which he is proved to be in receipt is his pay as such officer. Lord Ashbourne, C., said: "I can see no public policy to prevent the plaintiffs from obtaining payment of their debt by the compulsion of an order committing the defendant to prison for his default in complying with the order to pay the debt by instalments."

Holmes, L.J., said: "I cannot recall any case in which a committal order was made against a military officer, but I can recall many instances in which such orders were made against other public officials whose imprisonment would seriously inconvenience the public."

The same principle had been applied by the Court of Appeal in Ireland to the case of a national schoolmaster's salary against which there was an equitable execution: *Picton v. Cullen*, [1900] 2 Ir. 612. It was also applied in Ontario in the case of *Re Hyde v. Cavan*, 31 O. R. 189, where Boyd, C., refused a writ of prohibition to the County Court Judge who had made an instalment order against a Dominion official. The statute in that case, however, contemplated that such an order should not "deprive the official or his family of the means of living."

Without going as far as the Irish cases do, because it is not necessary to do so, I know of no principle which would prevent an examiner under the Collection Act from making an instalment order in the case of a government official where that course would not result in depriving him of being able to live on the salary, and thus impair his usefulness as such servant.

That would always be a question of fact for the examiner, and therefore he would not be without jurisdiction and his order would not be a nullity.

The appeal will therefore be dismissed.

RUSSELL, J., concurred.

MEAGHER, J., read an opinion to the same effect.

NOVA SCOTIA.

LONGLEY, J.

DECEMBER 27TH, 1906.

CHISHOLM v. CHISHOLM.

Infant—Parent's Agreement to Relinquish Custody—Agreement in Consideration thereof to Pay Annual Allowance not Enforceable.

Action on a contract tried before LONGLEY, J.

H. B. Stairs, for plaintiff.

The Attorney-General of Nova Scotia (Drysedale, K.C.), and H. McInnes, for defendant.

LONGLEY, J.:—As this is a case of some difficulty, I propose to give the reasons which have induced me, with some doubt, to reach a conclusion. The facts are very simple and not in dispute. I am not called upon to make any findings, and therefore if this case should be reviewed, the Court above will be in the same position as to the facts as I am.

The plaintiff is the widow of William J. Chisholm, deceased. The marriage took place January 14th, 1892. On November 8th of that year a child was born named Ruth. The husband died May 5th, 1896, leaving Ruth as the only child, and leaving his widow no property.

After the death of William J. Chisholm some correspondence took place between the widow and the defendant who is the father of William J. Chisholm, in reference to the child. It culminated in the following letter from the defendant to the plaintiff, dated April 6th, 1897, the child being then in the fifth year of her age:

“Dear Evelyn. I am in receipt of your letter of the 26th of March and note contents. You do not appear to have changed your views in regard to the right of guardianship I should have over your child, neither have I changed mine. You appear to think the claims are entirely on one side, whereas I claim that the one that has to act as parent towards the child, filling as far as possible the father's place, has his claims as well.

“I now propose to make you the following offer, which I will carry out, if it meets your approval, but not otherwise. I will allow you at the rate of \$500 per annum, payable quarterly in advance, for the support of yourself and Ruth, if you agree and promise to place her in the Convent of the Sacred Heart in Halifax, or in the Convent of the Sacred Heart in Montreal, and allow her to remain there in either convent until she has finished her education. And after you place her in either convent, I will allow yourself \$500 per annum, paid quarterly in advance, so long as I can do so whilst you are self dependent. If you think Ruth is too young to be placed in a convent now, you can keep her where she is a while, but I require that she will be placed in either convent not later than the 1st of September, 1898, where she is to remain until her education is finished. I will pay all her necessary bills for her education at either convent until she has finished her education. After she has finished her education I will allow her a sum yearly

to keep her respectably until she is of age, and then I will make a suitable provision for her, but for all this I require to be appointed her guardian, as a guarantee that her education shall be completed in the convent until she has finished it. You see I have no desire to part you from your child as you can live in either place with her, or any other place you may wish. I merely wish to do what I consider is for her welfare. She will be taken care of in a convent, as well as you can take care of her. When you were sick some one else had to take care of her, and if you go to Boston you will have to leave her behind you for some one else to take care of her. With regard to those persons of whom you have asked advice about your claim to your child, I can only say if they have any better terms to offer you and your child than I make you, then their advice is worth considering, but if they have only advice to offer you, we all know advice is cheap, possibly that is why it is so freely given. We are all well, and I trust you and Ruth and your family are well."

This letter is the basis of this contract and really the only document upon which this action is founded. The plaintiff at first seemed disposed to decline this offer. In a letter addressed to the Rev. Dr. Foley, April 10th, 1897, the plaintiff, speaking of the defendant's proposal in respect of the child says: "Same old terms, guardianship of Bab (Ruth) or not one cent. Well let him keep his money and he will carry with him the curse of one widow. . . . He said he wanted to be guardian as a guarantee that Bab's education would be finished in the Sacred Heart Convent. Now I was and am willing to make out a legal written guarantee that it would be begun and finished in the Sacred Heart Convent—what more just? But he does not guarantee me \$500 a year while I am self dependent, but says in his legally worded letter that he will give it to me as long as he can, which I and everybody can understand means that he can withdraw it at any time. No, dear Dr. Foley, I would rather starve than place myself in such a position. . . . If I appointed him as guardian he could legally claim her between the time she leaves school and twenty-one. . . . To take the legal right I have to Bab away from me for seventeen years and then tell me he will give me \$500 a year as long as he can; he really must think me a fool."

These extracts are given for the purpose of indicating the interpretation the plaintiff put upon the letter of defendant

now in issue. On the 20th April, 1897, however, the plaintiff answers the defendant, in which she says: "I find I can sign a perfectly legal binding paper, a guarantee. I will send you papers guaranteeing that she will be educated at the Sacred Heart Convent in Halifax or Montreal, beginning September 1st, 1898, as day pupil."

The defendant, however, the correspondence shews, did not recede from his original position. He told her at once not to go to the trouble of sending the legal papers she mentioned in her letter of the 20th, and on the 26th of July, 1897, he says in a letter: "I cannot have any clause inserted in it (the guardianship paper) that will destroy it. If you are afraid to trust me you need not sign it. You are not under any obligation to do so, and it rests altogether with yourself."

On the 15th November, 1897, the plaintiff signed a petition to the Supreme Court asking for the appointment of the defendant as guardian of the person and property of Ruth. On the 3rd December an order of the Supreme Court passed appointing the defendant the guardian of the person and estate of Ruth Chisholm, he filing a bond, etc.

The remaining facts are very simple. The defendant continued to pay the plaintiff \$500 a year in quarterly instalments until May, 1906. The child Ruth remained with her mother in Minneapolis until 1900, and did not go to the Convent of the Sacred Heart until June 12th, 1900. There was very little evidence apart from the correspondence. I gather that the child is still going to the Sacred Heart and the defendant is paying the bills. What caused the defendant to cease his contributions to the plaintiff must remain matter for conjecture, for no evidence of cause was given. Presumably the defendant was not satisfied with the plaintiff's conduct and proposed to stop the allowance.

The questions for determination are: (1) Does the letter of the defendant, dated April 6th, taken in connection with his subsequent appointment as guardian, constitute a binding contract? (2) Has the plaintiff, by any act of hers, released defendant from this contract? (3) If the contract, so far as it relates to the absolute guardianship of the child is contrary to law, is the contract sustainable upon any other consideration outside the custody of the child?

There may be other questions involved, but these are the ones which are presented to my mind.

As to the first, I think it is contrary to law for a father, or the father being dead, for a mother, for any monetary consideration, to sell or dispose of the care and custody of a child—at all events permanently. It seems to me that *Humphreys v. Pollys*, [1901] 2 K. B. 385, is authority for this general proposition. I can only interpret the letter of April 6th of the defendant as an agreement to pay the mother \$500 a year in consideration of his becoming the guardian of the person and estate of the child Ruth. Such a guardianship, I think, would enable the guardian to take the child out of the custody of the mother, until it was of age, and such a contract, I think, is void and not legally enforceable.

The second question I have no difficulty with. I do not find anything in the evidence to justify me in believing that the plaintiff has broken the contract. She joined in the application for the guardianship in the terms of the April 6th letter, and I have no evidence to justify me in finding that the child has not attended the Sacred Heart, and though the child did not attend at the time mentioned yet the correspondence makes it reasonably clear that any delay in this regard had the sanction of defendant. In any case I think, after he was appointed guardian, he had absolute control over the child, if he chose to exercise it.

The third question I have to consider, because the learned counsel for the plaintiff based his argument chiefly on the ground that allowing that the contract was illegal, so far as it related to the guardianship, there yet remained sufficient consideration in the education of the child at the Convent of the Sacred Heart. It was urged, and it is an unquestionable fact, that a very slight consideration is sufficient to uphold a contract like this. I was at first inclined to take this view, but the correspondence, which I have quoted, shews very clearly that both parties conceived that the guardianship was the essential feature of the contract. She said it meant giving up her child, and she would never agree to it. He wrote that no conditions must be attached to the guardianship, which must be absolute, or he would have nothing to do with the transaction. He declined to act on any guarantees for her education at the Sacred Heart.

I am, therefore, driven to regard the letter of April 6th and its fulfilment by the order of guardianship as a contract based solely on a transfer of the person of the child from the mother to the guardian, and this, in my judgment, is contrary to law. I find no other consideration for the claim of

\$500 a year by the mother except the transference of the custody and care of the child.

The claim is for \$3,000 for six years from June 12th, 1900, to date, upon a reading of the letter of April 6th, which is assumed to imply that \$500 a year extra is to be given when the child is placed in the Sacred Heart. I do not think this is a reasonable or a probable interpretation of the letter. I think the defendant is merely repeating his offer, which is not to be regarded as effective until the child is in the Sacred Heart. The statement of claim also claims \$125 for the quarterly payment alleged to be due August 1st, the defendant's last quarterly payment being made on May 1st, 1906.

I think the defendant is not liable under the contract for the reasons I have given, and I dismiss the action.

It will be for the Court of Review to determine, if the plaintiff is entitled to recover, whether she should have judgment for \$3,125 or for \$125.

NOVA SCOTIA.

LONGLEY, J.

DECEMBER 27TH, 1906.

SMITH v. BOUTILIER.

Trespass—Cattle Straying from Highway—Defective Fence.

Action for damages for trespass by defendant's cattle. tried before LONGLEY, J.

J. L. Barnhill, for plaintiff.

J. B. Kenny, for defendant.

LONGLEY, J.:—The facts in this case, which was tried before me, are as follows: The plaintiff owns a lot of land at Tantallon, Halifax county, and defendant owns another not far off. The settlement is on a road which leads from the main road towards a common. The road along the settlement is kept fenced and the cattle of the different lot holders go along the road toward the common which is used as a

general pasture lot. Tantallon is not a closed district under the statute.

The plaintiff complains that the defendant's cattle, among others, entered her close during May and June of this year and injured her field and garden. The answer is that the cattle got into her field through a gate which plaintiff kept in a defective condition. It was proved at the trial that the gate was fastened by a hook and staple and there was such a difference in the height of the hook from the staple that the latter was simply touching the former, and if a person or animal gave the slightest push to the gate it flew open. It was through this gate that defendant's cattle went. It was sought to prove that one of the defendant's animals was breachy and had special skill in opening the gate, but the evidence disclosed that when defendant's cattle were withdrawn entirely, cows belonging to other neighbours had no difficulty in getting into this gate.

The facts in this case are altogether different from those in *Dickie v. Gordon*, and the decision there would not govern here. At first I thought that a gate having been put in its place of sufficient height, the defendant was technically liable if his cattle, by any means, opened the gate, even though it was insecurely fastened. But a careful study of two Ontario cases, *McMichael v. Grand Trunk R. W. Co.*, 12 Ont. R. 547, and *Dunsford v. Michigan Central R. W. Co.*, 20 Ont. A. R. 577, has led me to the conclusion that where fences and gates are required they must be sufficient and effective against all cattle. In an American case, *Chicago R. W. Co. v. Utley*, 38 Ill. 410, the Court decided that a fence to be sufficient must not be merely one which will turn ordinary stock, for a slight barricade might do that, but one that will turn stock even though to some extent unruly.

My conclusions are that a fence was necessary in the locus and had been maintained by all the settlers along the highway for many years; that the plaintiff's gate did not fulfil the conditions of a lawful fence; and, therefore, that she cannot maintain trespass against defendant's cattle which, with others, entered her field. I therefore dismiss the action.

If the Court of Review should think my finding wrong on either of these points, the plaintiff's damages in any case would be very small. I should think \$8 would be the outside figure for any damage proved.

NOVA SCOTIA.

LONGLEY, J.

DECEMBER 24TH, 1906.

REX v. DONOVAN.

Intoxicating Liquors—Canada Temperance Act—Conviction—Magistrate Disqualified by Receipt of Fines—Prisoner's Right to Inspect Documents—Variance between Warrant and Conviction—Proof of Date of Information.

Motion for the discharge under habeas corpus of a prisoner confined in jail under a conviction for an offence against the Canada Temperance Act.

W. B. A. Ritchie, K.C., in support of application.

W. F. O'Connor, contra.

LONGLEY, J.:—Application has been made to me for the discharge of defendant under habeas corpus. The defendant was convicted of an offence against the Canada Temperance Act and adjudged to pay a fine of \$50 and \$5.50 costs, and in default of the same to be imprisoned for two months. His release is asked upon several grounds and I will deal briefly with each.

1. Magistrate disqualified because his salary depends upon fines collected. I do not feel sure that this would be a ground of release under habeas corpus, but in any case, upon an examination of the minutes of the council of the town of Glace Bay, I think the salary of the stipendiary is fixed and is a town charge and that it is payable whether any fines are collected or not.

2. The magistrate is alleged to have omitted or refused inspection of certain documents in the case to the counsel for prisoner. I do not find any statutable authority for the demand. The prisoner was entitled to receive the minute of conviction, which he did, and I am tolerably clear that any refusal of the justice to give inspection would not, in itself, be a ground for discharge under habeas corpus in the case of a legal conviction and a good warrant.

3. In the minute of conviction given to defendant the costs are put at \$6.00, whereas in making the warrant of commitment the amount is placed at \$5.50, and \$5.50, it ap-

pears, was the correct amount. I do not think this is such a variance as would vitiate a legal conviction or justify release under habeas corpus.

4. Papers do not shew information laid previous to date of offence. I am afraid I do not either understand or appreciate the force of this objection. The papers shew that on the 27th of November, 1906, the defendant was convicted of an offence committed on the 25th of November, 1906. This is certainly well within the three months' limit fixed by the Act, and I do not conceive that it is essential to shew upon the face of the warrant the date of the information.

5. I have reserved the chief objection to the committal to the last, as it was upon this that the counsel for prisoner seemed chiefly to rely. The claim is that the punishment awarded in the conviction is capable of being read as in the alternative. It is admitted that the warrant of committal is regular. I am not clear that the paper which is called the "conviction" is an essential feature of the proceedings. Nor do I see any difficulty in reading the conviction consistently with the warrant of commitment. I think the warrant of commitment is good and *Reg. v. Van Tassel*, 34 N. S. R. seems to me authority for regarding the warrant as the essential paper. The cases cited by the learned counsel for defendant, the two Ontario cases, *Reg. v. Brady*, 12 O. R. 358, and *Reg. v. Haley*, 20 O. R. 481, do not seem to me to sustain his point, although some passages from the judgments bear such an interpretation. I do not regard *Reg. v. Perley*, 25 N. B. R. 43, as quite consistent with the principles which have governed the decisions of this Court on this point.

As these were the only grounds upon which I was asked to discharge the prisoner, I have no alternative but to decline the application.

NOVA SCOTIA.

LONGLEY, J.

DECEMBER 21ST, 1906.

IN RE McDONALD ESTATE.

Costs—Probate Court.

Review of the costs of an action in the Probate Court. The principal contest was over items 31 to 47, attendances

"and hearings" before the Judge, October 26th, 1906, to November 6th, 1906. The tariff provides that for every hearing or argument a fee may be taxed of from \$2.50 to \$10. The Judge taxed on the principle that each adjournment constituted a different hearing and allowed \$1.50 for attendance and \$10 for hearing for each morning and afternoon on which the Court sat.

The contention of the appellant was that there could be but one "hearing" irrespective of adjournments.

J. P. Foley, for the appeal.

T. R. Robertson, contra.

LONGLEY, J.:—I am asked to review the taxation of the Judge of Probate in this case, on an application to prove a will in solemn form. The items of the will are all numbered and I will deal with them.

Item 3 (hearing \$10) I allow as taxed, though having some doubt as to whether the matter justifies any allowance for hearing. The same remark applies to item 11 (hearing \$10.) I strike out item 13 (attendance to issue citation.) I reduce items 17 and 18 (preparing letters to Gazette and sheriff, 50c. each) to 10c. each. I strike out all items from 31 to 47 and substitute four items in place thereof, namely: Attendance on taking evidence, \$1.50; hearing on same, \$10; attendance on argument, \$1.50; and hearing on same, \$10. I have some doubts as to my authority to allow separate items for attendance and hearing on argument, but I allow the items upon a liberal interpretation of the words of the statute in the costs and fees chapter.

I strike out items 58, 59, and 69 (stenographer) entirely. There is an affidavit that the parties agreed to have a stenographer. If this be the case, probably a part of the stenographer's bill can be recovered against the losing party, but I do not find any statutable authority to tax it in a bill of costs, and the English authorities have decided that stenographers' bills cannot be allowed on taxation unless stenographers have been authorized by statute. I find no statutable authority for their employment in the Probate Court.

Item 71 of the Judge's bill (hearing petition, \$2.50) I strike out as without any statutable authority. Item 73 (hearing and order on executor, \$2.50), I think, should be reduced to 20c. Also item 74 (hearing application for exe-

cutor.) I do not find any authority for item 75 (examining and approving bond and order, \$2.50), but I allow 20c. all under the heading "process not otherwise provided for." Item 78 (hearing argument and decision, \$10) must be struck out.

In the registrar's bill, after careful consideration, I have to strike out items 81 and 83 (two orders and seals, \$1.50 each.) I can find no statutable authority for them whatever. Items 89 and 90 (25 subpoenas at 50c.) must be reduced. The affidavit before me declares that only five subpoenas were issued, which would entitle the registrar to 50c. each, \$2.50. Item 91 (attendance 8 days, at \$2.50) must be struck out. I find no authority for allowing attendances for registrar on contestations. Item 92 (decision, \$1) for the same reason, must be struck out.

If counsel will present the bill with these alterations I will sign it.

NOVA SCOTIA.

FULL COURT.

DECEMBER 22ND, 1906.

CORBIN v. PURCELL.

Contract—Action to Enforce—Counterclaim for Damages—Judgment Dismissing Action and Counterclaim—Appeal by Plaintiff—No Appeal by Defendant—Appellate Court no Jurisdiction to Enter Judgment in Defendant's Favour on Counterclaim.

Appeal by plaintiff from the judgment of WALLACE, Co. J., argued before GRAHAM, E.J., MEAGHER, and RUSSELL, JJ.

J. C. O'Mullin, for the appellant.

J. J. Power and M. M. Reynolds, for the respondent.

J.:—The judgment of the Court was delivered by RUSSELL, J.:—The plaintiff is suing for the balance due on the sale of a milk route together with sundry horses, cows, cans and other things. The defence is misrepresentation of the profits derived by the plaintiff from the business, and a counterclaim for damages for the misrepresentations, treating them as

fraudulent. The defendant cannot rely on the misrepresentations as a ground for rescission, as he has received the property and so dealt with the business that he cannot make restitution. His case must depend on the counterclaim for damages, but this has been dismissed, and from the order dismissing it there has been no appeal. The defendant claims that under the order corresponding to O. 58, r. 4 of the English Rules, the Court is bound to make the order that the Judge below should have made notwithstanding that the notice of appeal in that part only of the decision may be reversed. I think that the effect of the rule referred to cannot be so far extended. The counterclaim is an independent action and not a mere defence to the plaintiff's claim, and if the defendant was dissatisfied with the decision dismissing the counterclaim, it was incumbent on him to appeal from that decision. He cannot ask this Court to deal with the counterclaim from the dismissal of which there has been no appeal under a notice of appeal given by the plaintiff which is confined to the issues arising under the defence to the statement of claim.

The appeal should, I think, be allowed with costs, and judgment entered for the plaintiff.

NOVA SCOTIA.

FULL COURT.

DECEMBER 22ND, 1906.

SLIPP v. MORRIS.

Justices' Court—Territorial Jurisdiction—Evidence—Judgment for Plaintiff — Appeal by Defendant to County Court — Defendant Entitled to Dismissal of Action if Want of Territorial Jurisdiction made out—Not Limited to Remedy by Certiorari.

Appeal by plaintiff from the judgment of McKENZIE, Co. J., dismissing with costs an appeal from the Justices' Court on the ground of want of jurisdiction, argued before TOWNSHEND, J., GRAHAM, E.J., RUSSELL and LONGLEY, JJ.

T. W. Murphy, for the appellant.

The Attorney-General of Nova Scotia (Drysdale, K.C.), for the respondent.

GRAHAM, E.J.:—Fortunately in law there is frequently more than one remedy afforded for a grievance. The existence of one does not exclude the other, and the practitioner has a choice. But generally one remedy is more appropriate to the particular case than any other, and the practitioner is expected to use that one. If he does not do so he may be punished by being deprived of costs, if he has taken a remedy unnecessarily burdensome, or if the remedy he resorts to is outrageously disproportionate to the grievance in comparison with an obviously simple remedy, and the Judge has a discretion. He may in certain cases refuse the remedy altogether.

There may be many cases in inferior tribunals in which an aggrieved party may resort either to appeal or to certiorari. Both are open to him and sometimes it is difficult to say which is the most appropriate.

The fallacy in the judgment of the Judge in *In re Ruggles*, 35 N. S. R. 57, underlies the judgment of the learned Judge of the County Court in this case. In the former the Judge refused to grant a writ of certiorari because he held that an appeal would lie. In the latter case the Judge has dismissed an appeal because he held that certiorari would lie. In *In re Ruggles* there was short service of a magistrate's summons for a civil debt; the defendant did not appear, and there was no proof of a debt on the return day, as the statute requires, and it was held by the Court on appeal from the Chief Justice, that the writ should have been granted; that the defendant should not have been required to go to trial before the magistrate and then to appeal and have a fresh trial in the County Court to raise such a question, when by his very appearance in the magistrate's court he might waive the defective service. Certiorari was the more appropriate and adequate remedy. And an appeal was not appropriate or adequate, but possibly under judgments which bound this Court it might have been successful.

In this case, a summons to recover a small amount in the magistrate's court, the defendant appeared and raised the point in the case that it was not within R. S. c. 160, s. 1, namely, that the cause of action did not arise within the county in which the magistrate was acting, and that the defendant did not reside there, but had been served in another county out of the jurisdiction under the statute. The defendant thereupon contended that the magistrate had no

jurisdiction, and should dismiss the action. And the statute is clear. Unfortunately he did not do so, but gave judgment for the plaintiff for some of the items, and the defendant appealed to the County Court. Section 35 of the Act provides that "any party dissatisfied with the judgment of the justice may appeal therefrom to the County Court."

Now the County Court Judge tried the case on the merits, hearing all the evidence tendered, and then the defendant raised this question. The Judge dismissed the appeal because he thinks certiorari was the only remedy, and the magistrate not having jurisdiction, he had none when it came to the court of appeal.

The English cases are cited in the case of *In re Ruggles* to shew that a person may have his choice of these remedies; in many cases a certiorari even after an appeal has been taken, which did not reach the particular grievance. I refer to *Reg. v. Jukes*, 8 T. R. 542; *Reg. v. Justices of Surrey*, L. R. 5 Q. B. 466; *Reg. v. Slade*, 72 L. T. N. S. 568.

In this case it would have been very awkward for the defendant to stay away and have evidence given to shew that the defendant was a resident of that county, or that the cause of action arose in that county, and have the magistrate decide in favour of that view: *R. v. Bolton*, 1 Q. B. 66; and further, when the application for the writ of certiorari after judgment came on for hearing, it would be awkward to have a dispute on affidavits as to whether or not the cause of action arose in that county. In some cases that is a ticklish question. Therefore I cannot say that the trial of those facts before the magistrate and an appeal were inadequate or inappropriate. But even if it was not the best remedy it was a remedy open to the defendant, and it is a cheap remedy.

When a question of jurisdiction could only be determined by eliciting the facts, as here where the question of the place where the cause of action arose was involved, the magistrate, I think, would be perfectly right in trying and determining that question, and when he found that he had no jurisdiction, there is clear law to shew that he may not only dismiss the action, but may dismiss it with costs.

(Reference to *Beulair v. Gilliatt*, 3 N. S. D. 526; *Spooner v. Juddow*, 6 Moo. P. C. 257; *Parker v. Elding*, 1 East 352; *Thompson v. Ingraham*, 14 Q. B. 718.)

As to the power to dismiss with costs when the Court has no jurisdiction, the reports of the Supreme Court of Canada shew many cases of that character.

Then as to the question of the court of appeal having jurisdiction to give the judgment which the magistrate should have given when he had no jurisdiction, I think that the County Court Judge should have dismissed the action. (Reference to *Barber v. Palmer*, 7 Q. B. D. 9, 3 Am. Encyc. of Law, p. 189; *Whittemore v. Amoskeag Bank*, 134 U. S. 529; *Nashua v. Boston*, 51 Fed. Rep. 930; *Ryder v. Hall*, 128 U. S. 525; *People v. Ferris*, 36 N. Y. 218.)

For the reasons given I am of opinion that in this case the learned County Court Judge, having jurisdiction to enter on the enquiry, which enquiry was necessary to the determination of jurisdiction, should have given a judgment dismissing plaintiff's action. There may be cases in which he would not have even that jurisdiction—say an appeal from a magistrate appointed only for the county of Hants sitting in the county of Colchester, or a case in which a note for over \$80 was the claim attached to the writ of summons—but it is sufficient to say in this case, where he had to take evidence to establish want of jurisdiction upon the authorities, that he had jurisdiction to determine that the case ought to have been dismissed.

The appeal will be allowed and the plaintiff's action dismissed in the County Court, the defendant to have the costs in all the Courts.

TOWNSHEND and RUSSELL, JJ., concurred .

LONGLEY, J., read a judgment reaching the same conclusion.

NOVA SCOTIA.

FULL COURT.

DECEMBER 22ND, 1906.

BARNES v. WAUGH.

Sale of Goods—Article of Food Merchantable when Shipped and Unmerchantable when Received by Purchaser—Exceptional Cause for Deterioration — Onus of Proof—Oysters.

Appeal by the defendant from the judgment of WALLACE, Co. J., in an action for goods sold and delivered, argued before GRAHAM, E.J., MEAGHER, and RUSSELL, JJ.

F. H. Bell, for the appellant.

H. Mellish, K.C., for the respondent.

GRAHAM, E.J.:—This is an action to recover the price of fifteen barrels of oysters. There is a defence and a counter-claim alleging that they were not merchantable. The case depends upon the question whether they are to be merchantable at the place of shipping or on the actual receipt by the vendee.

The plaintiff carries on business at Buctouche, New Brunswick, cultivating and selling oysters, and the defendant is a restaurant keeper at Halifax. The parties had previous dealings. The oysters were shipped f. o. b. at Buctouche, and the defendant paid the freight. There had been correspondence previous to the 21st January, 1904. The defendant, later, by telegraph, gave an order to ship fifteen barrels first soft weather. On February 1st ten barrels were put up and shipped, and on February 7th five barrels were shipped. They would go by freight cars from Buctouche to Moncton and thence by the Intercolonial Railway to Halifax. The ten barrels were received on the 4th of February, and the five barrels on the 9th. The weather was soft when the lots were shipped. The learned County Judge has found that the oysters were in a merchantable condition when they were delivered on board the cars at Buctouche. The evidence entirely supports that finding. The plaintiff says that they were sound and good when shipped. They had been kept in frost-proof warehouses, and were hand-picked and put up and shipped on the same day. He says: "These goods were not frozen when shipped. If the oysters were frozen in transit it would not necessarily make them bad unless they were allowed to thaw. . . . I don't think that such oysters, taking four days to come to Halifax, would spoil if frozen and kept frozen. It would be necessary to keep them frozen. If the second lot took four days in transit, I don't think they would become bad unless they were frozen and became thawed out by some process. You would want to have a cellar more than cool. They would have to be kept frozen. . . . If these oysters froze and thawed before they reached defendant they would open and be unmerchantable."

The defendant, on receipt, put the ten barrels in his cellar. The five barrels he took into his shop, sold one barrel to one Bowman, and two barrels to Boutilier, and they were

returned as bad. The defendant examined the whole five barrels and they were wholly bad. He then examined the ten-barrel lot also and they were all bad. They had to be removed to the dump.

The plaintiff had judgment, and the defendant appeals and contends that the law requires that oysters must be merchantable when they were received at Halifax, and for this contention he relies on the case of *Beers v. Walker*, 46 L. J. C. P. 677. In that case there was a contract by plaintiff, a wholesale provision dealer, to supply dead rabbits weekly by rail, from London to Brighton, to the defendant, who was a retail dealer there. The rabbits were sound when delivered to the railway company in London, but unfit for human consumption when they reached the defendant. It was admitted by the case that they were sent in the ordinary course of business and it was assumed by the Court that nothing exceptional had occurred on the transit. It was held by Grove, J., that there was an implied condition that the rabbits should be fit for human food, and further, that this condition extended until, in the ordinary course of transit, they reached the defendant at Brighton, and he had a reasonable opportunity of dealing with them.

In this case I am of opinion, as the trial Judge has found, that the oysters were delivered to the defendant when they were shipped at Buctouche. Then I think that there is this distinction between the facts of the two cases. I have referred to the fact that Grove, J., assumed that nothing exceptional or accidental had occurred after shipment. The facts here tend to shew that in that respect this case is different. The oysters were alive and unfrozen when they were shipped at Buctouche. The rabbits were dead. The oysters could have only reached the condition described by the defendant by an exceptional or accidental cause, that is, by being frozen in transit and not being kept frozen. Nothing but an exceptional cause could have killed them all, and they could not pass from a condition of life to such a sudden condition of decomposition, except through the intervention of frost. That would be held to be an exceptional thing. The order to ship in soft weather indicates the possibility. In *Benjamin on Sales*, p. 640, the writer, after dealing with the case of the rabbits, says: "Of deterioration arising from exceptional or accidental causes, the owner must take the risk; that is to say the seller, if he contracted to deliver

the goods at their destination, or the buyer if the goods were merely to be sent off."

This, too, distinguishes this from the case of *Brill v. Hartlen*, tried before Ritchie, J. I will not try, because it is not necessary, to distinguish between the case of a contract to supply very perishable food weekly at a given place at a distance to a customer, and the case of an occasional order to an oyster producer, who is shipping on orders from all over Canada, to ship an article of food at that place on a particular occasion, as in soft weather, when I think there is less reason for holding that there is an implied warranty that the article will be merchantable when it reaches the vendee.

The appeal will be dismissed and with costs.

MEAGHER, J., read a judgment reaching the same conclusion.

RUSSELL, J.:—The plaintiff was engaged in the business of cultivating and selling oysters, and in February, 1904, sold fifteen barrels to the defendant, which were shipped in two lots of ten and five barrels on the 4th and 9th of February, respectively. They had to go from Buctouche to Moncton by a branch road, and thence to Halifax by the Intercolonial Railway.

The first lot, according to the statement of counsel, was three days on the road, and the second lot four days. The learned Judge has found that the goods were in a merchantable condition when shipped, and that under the contract the delivery was complete when they were put on board the cars at Buctouche. There can be no doubt that the delivery was complete at Buctouche, but the only question is whether there was not an implied condition that the goods should be fitted to stand the journey to Halifax and be merchantable on their arrival there. The rule deduced from the cases by the latest editors of *Benjamin on Sales*, is that "where goods are ordered for shipment to a distant place the goods despatched will not be merchantable unless they can so stand the journey to the buyer as to be merchantable (saving necessary depreciation) on arrival, and until the buyer has a reasonable opportunity of dealing therewith in the ordinary way of trade." The language is a paraphrase of that used by Grove, J., in *Beer v. Walker*, 46 L. J. C. P. 677, the clause in parenthesis being founded on the case of *Bull v. Bobison*, and the

doctrine of *Beer v. Walker* was followed by Ritchie, J., at nisi prius in the unreported case of *Brill v. Hartlen*, in which meat shipped from Toronto to Halifax was found to be unmerchantable on its arrival here. Ritchie, J., said: "It being a sale of goods not specific, there was a warranty by the plaintiff" (strictly speaking it was a condition) "that they should be merchantable and fit for use, and under the authority of *Beer v. Walker*, 46 L. J. P. C. 677, I think that warranty continued until the delivery here to the defendant."

In the case I have mentioned the plaintiff, a wholesale dealer, sold a cask of dead rabbits to the defendant, who did business at Brighton, and sent it to him by rail. The rabbits were bad on their arrival at Brighton, and the Court below held that the warranty ceased on the delivery at the station in London and found for the plaintiff, but this judgment was reversed on appeal. (Citation from judgment.)

No question can arise in this case such as was presented in the course of the argument, of an order for goods from a distance of a kind that could not, under any possible circumstances, arrive at their destination in a merchantable condition. It is in proof that it is an ordinary thing to ship oysters from Buctouche to Halifax, and I think that in accordance with the proposition correctly elicited by the editors of *Benjamin on Sales*, from the case of *Beer v. Walker*, we must hold that the oysters sued for in this action were not merchantable unless they were suited to stand the journey to the buyer, and be merchantable for a reasonable time thereafter. If the deterioration arose from exceptional or accidental causes the owner, who in this case was the purchaser, must take the risk, as there was no contract to deliver them at Halifax, and the property, if the condition of merchantable quality was complied with, passed on its shipment at Buctouche. But I think that the burden was upon the plaintiff to shew that the deterioration was due to some such exceptional or accidental circumstance, and that in the absence of such evidence we must conclude that the goods were not in such a condition when shipped that they would be merchantable for a reasonable time after their arrival at Halifax. The judgment in favour of the plaintiff should, therefore, I think, be reversed.

I am sorry to have to dissent from the judgment of the Court, but I do not see how I could agree with my brother Graham without taking judicial notice of the fact, if it is a

fact, that a barrel of oysters cannot be merchantable for sale at Buctouche and become unmerchantable by the time it reaches Halifax, without freezing and thawing. Nor can I agree with my brother Meagher without discrediting the uncontradicted evidence that the oysters were bad when, or soon after, they arrived at Halifax. My private belief is that the oysters did freeze en route, for which the plaintiff could not be held liable, and therefore I believe that the judgment of the majority does substantial justice, and I am very glad that my learned brothers have been able to dismiss the appeal.

NOVA SCOTIA.

FULL COURT.

DECEMBER 22ND, 1906.

COURTNEY v. PROVINCIAL EXHIBITION COMMISSION.

Contract—Building Contract — Engineer's Certificate—Extras—Written Direction of Engineer—Grading Marks on Posts.

Appeal by the defendants from the judgment of RUSSELL, J., argued before TOWNSHEND, J., GRAHAM, E.J., and MEAGHER, J.

H. Mellish, K.C., for the appellants.

W. B. A. Ritchie, K.C., and W. F. O'Connor, for the respondent.

TOWNSHEND, J.:—The defendants entered into a contract with Monaghan & Sutherland for the construction of a half-mile track on the Exhibition Grounds, on the 17th August, 1897. This contract and all connected with the performance of the same was assigned to the plaintiff, who now sues the Commission for an alleged balance due under the contract and for extras and for certain work done independently of the contract also assigned to plaintiff. The action was tried before Russell, J., with a jury. Certain questions were submitted to the jury, to all of which answers were returned favourable to the plaintiff. On these findings the learned Judge entered judgment for plaintiff for the sum of

\$2,826.80, with costs. The defendants asked for a new trial claiming that the answers to the 1st, 2nd, and 9th findings are against the evidence and are irrelevant; or in the alternative that the judgment be reduced by the sum of \$934.95 and the sum of \$980, and that they should be credited with the sum of \$282 credited in the statement of claim and by the sum of \$20 per day for each day's delay by the contractor in completing the contract. They further appeal from the order for judgment and ask that the action be dismissed, or, in the alternative, that it be reduced by the above amounts except the \$20 per day penalty.

It is conceded that the amount credited in plaintiff's particulars should be allowed. The \$980 is the balance claimed to be due on the contract, which was \$4,980, and on which \$4,000 only has been paid, and the balance has been retained by the defendants on the ground that the contractors did not complete their contract.

The \$934.95 represents the amount claimed because of the alleged mistake made by the engineer in fixing the stakes and work done outside the contract.

The defendants admit that \$629.85 is due, which they are willing to pay with costs of the action, but claim that they should not bear the costs of the trial relating to the issues wrongly found in plaintiff's favour.

The defendants claim that the findings of the jury in answer to the 1st, 2nd, and 9th questions were not only against the weight of evidence but were also immaterial. The first question, which the jury answered in the affirmative, was, "Were the contractors led into putting additional surface material in the embankment beyond what was required by the contract by stakes placed in the ground by the City Engineer or some person authorized by him, and marked to indicate the height of the sub-grade and the finished surface, or either?" The second question with the answer merely fixes the loss occasioned by the mistake and stands or falls with the first.

The drawings and specifications are made part of the contract, and on referring to these it will be found that very precise provisions have been laid down in respect to the work and under what conditions it is to be carried on. One of the first is that "the track shall be located as nearly as possible on the lines shown on the plan and the exact loca-

tion will be staked out by the engineer or his assistant." It is clear to my mind, although the learned trial judge thinks differently, that location here refers only to the horizontal location of the track and has no reference to the grading or sub-grades. This is made clearer still by other provisions and explanations on the plan in which the concrete pier is made the standard. The words are, "all levels refer to the top of the concrete pier at the north-east corner of the grand stand, the elevation of which is 195.67. Grade elevation of finished surface of track at the pole fence is 192."

Sutherland, one of the contractors, on cross-examination, says: "The specification shows the slope at any part of the track; it shows how much you would have to raise it to the foot out to the edge. Taking this plan and your specification H-A, I could go and do the work. If there was no engineer I think I could manage it myself. I might make a mistake. That is the plan and specification on which the work was finally completed." He further says: "We do not claim that by reason of what we call the mistake of the engineer we put any more material on the track than would have been necessary under the contract, but we claim that we put better material than would have been necessary—that is our claim." One of the engineers states with plan H-A, referred to in the specifications and signed by the contractors as the plan under which the work was to be done, and the specifications, there was no difficulty in understanding and doing the work under the contract. It appears from the evidence that a previous contract for doing this work was made with one Murray and owing to his default the contract was rescinded. A plan was attached to Murray's contract showing the grade a foot lower at the north end of the track. When the contract was made with the present contractors the new plan showed that the grade was to be a foot higher. The contractors before tendering are shown to have had this plan in their possession, and evidently worked under it, which would seem to account for the mistake made in the grade. Whether this be so or not it could not excuse their failure to comply with the terms of the contract they had signed. The contention, however, is that the defendants' engineers misled them by placing marks on the stakes indicating the grade up to which they constructed the track. This is denied by the engineers, and in my opinion the evidence preponderates on this point in defendants' favour. The jury having

found in plaintiff's favour without passing on the question of the weight of evidence, it is important to look at the contract and see if that finding becomes material. The jury say the contractors were misled by stakes placed on the ground by the City Engineer, or some one authorized by him, to indicate the height of the sub-grade and of the finished surface—in fact for both. Does this fact make defendants responsible for the loss incurred? By the terms of specification the “track is to be finished to the required grades in every particular, and the decision of the engineer on any matter in connection with the grade or lines shall be final.” Admittedly the track was not finished to the required grade until the additional foot was added to the north end.

Again, “The several works hereinbefore specified and the drawings or plans herein referred to include all operations and details which may not be shown or described, but are necessary for the proper execution and completion of the works, and are to be executed under the contract and to the satisfaction of the engineer of the Provincial Exhibition Commission.” It is admitted that the plans did not show that the track at the north end was to be raised one foot higher than the contractors had constructed the same and did not show the mark which was to guide them in doing so, and it is beyond doubt that they did not comply with the direction. Again: “No deviation from the plans and specifications shall be made unless the same shall be directed by the engineer in writing.” There can be no doubt that building the track a foot lower than the plan indicated would be a deviation, and no written authority from the engineer has been proved. It was argued that the marks said to have been placed on the stakes by the engineer, or by his authority, amounted to directions by the engineer in writing, and we were referred to *Munro v. Town of Westville*, 36 N. S. R. 321, as authority for that proposition. A reference to that case discloses in the first place some important differences in the contract, and even if there were no difference it cannot be regarded as supporting plaintiff's contention here. Ritchie, J., who gave the judgment of the Court on this point, says: “On the argument a question was raised in relation to the nature of the written order, and I am of opinion that a detailed plan furnished by the architect, showing the additional work to be done, should be considered under the terms

of the contract as the written order of the architect." It was in evidence in that case that the changes and additions to be made from time to time in the construction of the building were made in detail, indicating exactly what was required, and surely no better written instructions could be furnished. But it would be going far beyond and outside of that decision to hold that some figures made on a stake were equivalent to written instructions and were intended to change the terms of the contract. There is some force also in defendants' contention that there is nothing in the contract to require or authorize the engineer to put down stakes with marks on them. The specifications and plan fixed the height and width and grades, and the only duty of the engineer was to see that the contractor complied with these specifications. In this view I hold that defendants' contention is sound that the findings 1 and 2 are immaterial, for assuming the engineer or his assistant did make the figures, they had no authority under the contract to do so, and even if they had, the alleged alteration was not directed in writing.

I now turn to the other branch of the case, whether plaintiff can recover for work under the contract at all in the absence of any certificate or approval of the engineer of the work being completed to his satisfaction. The engineer in the most emphatic terms, in answer to the question whether the work under the contract was executed to his satisfaction, replied, "No, it was not." He had previously given in detail the various points in which the contractor had failed to comply with the terms of the contract, and on reviewing the evidence I cannot see that the defects were trivial. But whether so or not is of no consequence, as by the agreement the engineer is made the absolute judge, and in my opinion the law is well settled, except in case of fraud, that the engineer's approval that the work is done to his satisfaction is absolutely necessary before plaintiff can recover. In this connection I need only cite one of the numerous authorities on this subject found in 3 Best & Smith 364, where Cockburn, C. J., deals with the law in this regard. It is scarcely necessary to repeat the stringent terms of the contract in which it is provided "that the proper execution and completion of the works . . . are to be to the satisfaction of the engineer of the Provincial Exhibition Commission, and payment to the amount of 85 per cent. of the amount of

the tender will be paid upon the satisfactory completion of the work within the time specified. The remaining 15 per cent. will be paid one month after the entire completion of the contract."

It was suggested that the Commission had accepted the work by their conduct in using the track. No question on that subject was submitted to the jury, and so far as the evidence goes it seems to me to rebut any such inference. The specification alone suffices to show that they might take possession in the event of the contractors not completing the work in time, and were at liberty to have the work completed at the contractors' expense.

It is also contended that the first and second findings should be set aside as against the evidence. It does not appear from the answer to the first whether the jury thought the stakes were placed by the engineer or by some one authorized by him. The engineer denies that he did so, and so far as I read there is not one who pretends to say that he did. Some of plaintiff's witnesses swear that the stakes were put in by the assistant engineer, but the engineer swears positively that he neither made nor authorized any one else to make any alterations or deviations from the plan except in one respect not connected with this dispute, and he further swears that he never heard any mention of mistakes until after the contractors had ceased working on the track. The assistant engineer swears that he made no mistake whatever in placing any of the stakes, and that those put in by him were either for Murray's contract or after he discovered that the contractors were not building up to the required level, but nowhere does he state that he had any authority from the engineer to put in stakes and mark them for the contractors' guidance. He also corroborates the engineer in stating that he heard nothing of any mistakes in the placing of the stakes until after the contractors had left the work. There is no evidence at variance with the assistant engineer's statements that in putting such stakes as he did he had no authority from the engineer to make any alterations or deviations from the contract. His explanations as to the stakes he did put down, and the reasons therefor, are quite consistent with his conduct and duty to see that the contractors raised the grade to the height required by the plan and specifications. It seems to me that the findings of the jury in answer to ques-

tions 1 and 2 are against the weight of evidence and should be set aside.

In the view I have taken the answer to question 9 is irrelevant and immaterial and should also be set aside. Whether practically completed or not in the opinion of the jury is beside the question. The engineer, by the terms of the contract, was to be the sole judge on that point, and he has determined that it was not.

Moreover, I am of opinion that the defendants' motion must prevail and the amount fixed by the order for judgment be reduced to \$629.85; that the defendants should pay the costs of the action and trial with the exception of those issues now decided in their favour; and that they should have the costs of those issues on which they succeed and the costs of this appeal.

GRAHAM, E. J., and MEAGHER, J., read opinions reaching the same conclusion.

NEW BRUNSWICK.

BARKER, J.

DECEMBER 18TH, 1906.

PICK v. EDWARDS.

Principal and Agent—Collection of Rents—Failure to Account—Laches and Acquiescence of Principal—Repudiation by Agent of Agency.

W. B. Chandler, K.C., for plaintiff.

Currey, K.C., and McLellan, for defendant.

BARKER, J.:—This suit was brought to obtain an account which the plaintiff claims from the defendant as his agent, of the receipts and profits of a lot of land on Queen Street in Fredericton, and generally for an account of his dealings as such agent in the management of the property. Edward Pick, the plaintiff's father, seems to have owned the land in question for some years previous to his death in 1840. He died intestate, leaving a widow and two children—the plaintiff and his sister. Mrs. Gregg. James Mount, a widower

with one daughter, Sarah E. Mount, subsequently married the widow Mrs. Pick. Some time after that marriage, the plaintiff and Mrs. Gregg, his sister, sold their interest in the property to their stepfather, James Mount. Mrs. Gregg conveyed her interest in 1848 and the plaintiff conveyed his in 1857. Mount died in 1873, intestate, leaving a widow but no issue of his last marriage. On his death his daughter Sarah E. Mount became entitled to the property subject to Mrs. Mount's right of dower. She entered into possession of it and carried on a millinery establishment on it until her death, which took place in February, 1880. She died intestate without having been married and without any next of kin so far as is known. She died quite suddenly at the house of the defendant's father, between whose family and her own a close intimacy had existed for many years. The defendant undertook the charge of her funeral and assumed the expenses connected with it. The circumstances being somewhat unusual, the plaintiff, who was then living in Moncton but had gone to Fredericton to attend Miss Mount's funeral, and the defendant went to the present Mr. Justice Gregory, who was then practising there, to consult him as the best course to adopt in reference to the estate. Under his advice the defendant applied for administration as a creditor by reason of his having become responsible for the funeral expenses, and letters of administration were afterwards granted to him. He took possession of the personal property, disposed of it, and, I believe, had his accounts passed in the Probate Court. So far there does not appear to be any dispute as to the facts. The plaintiff says that as a result of an agreement then arrived at between him and the defendant, Judge Gregory was instructed to prepare, and that he did in fact prepare, a power of attorney from the plaintiff to the defendant, by which the defendant was to take possession of the lot in question for him, the plaintiff, and as his agent to hold possession for him and to account to him for it. He further alleges that this power of attorney was actually executed by him and the defendant, and that the defendant has since that time managed the property and received the profits of it for him as his agent, but that he refuses to account for it in any way. In answer to this case the defendant says that he never was the plaintiff's agent in reference to this property, that there never was any such power of attorney executed by him or acted

upon by him, but that he entered into possession of the property after Miss Mount's death in his own right and has since that time been in the exclusive and continuous possession of it, whereby he has acquired a statutory title, good against every one, except, possibly, the Crown, and that he is, therefore, in no sense accountable to the plaintiff for the profits of it. The defence is not that there was an agency originally which was subsequently terminated. Had that been the case the inactivity of the plaintiff during all these years would have seemed almost conclusive against him. The defendant, however, says there never was any such agency and therefore there was none to abandon or terminate. Neither does the defendant in any way set up the Statute of Limitations in bar in whole or in part to the account asked for. On the contrary, he says he never was an accounting party to the plaintiff. I confess to the greatest difficulty in deciding which is the more improbable thing to happen—that the management set up by the plaintiff should actually have been made in 1880 and been altogether forgotten by the defendant, or that it should have been made and that the plaintiff himself should for over 25 years never have received an account, never asked for one, and take so little interest in the matter. The only difference between the two is that the plaintiff admits his apparent want of interest, while the defendant does not admit his apparent want of memory.

Whether the arrangement set up by the plaintiff was actually made or not depends principally on the evidence of Mr. Justice Gregory and that of the plaintiff. Mr. Justice Gregory, after speaking of his personal acquaintance with both parties and their respective families, says that on or about the 25th February, 1880, which was the date, or about the date, of Miss Mount's funeral, he attended at an interview of the plaintiff and defendant at the instance, he thinks, of the defendant, at the defendant's father's house, to discuss the best course to adopt as to Miss Mount's property. It was agreed by the parties at that time, on his suggestion and advice, that the defendant should take out administration of the estate as a creditor, resting his claim to administration upon the fact that he had become a creditor by paying her funeral expenses as a necessity. A petition was prepared on that ground, a citation was issued and letters were subsequently granted to the defendant. As to the real estate Judge

Gregory's evidence is as follows: "In regard to the real estate it was agreed that I should prepare—" Mr. Curry: "I would like you to state as near as you can what took place rather than from conclusion." "I don't know how I could tell any better. I think it was my own suggestion, because they were talking over the real estate and there being no heirs and the probability or possibility of its being claimed by the Crown—because they didn't know of any, there were certainly none in the Province, and they didn't know there were any living—and the fact that the Crown might claim this estate at the same time was discussed, and finally I was instructed by the two of them to prepare a power of attorney from Geo. H. Pick to John A. Edwards to take possession of the property and care for it and hold it for him, Geo. H. Pick, he having been in some way connected with Miss Mount. Geo. H. Pick's mother was married to old Mr. Mount after she became a widow, and the two families, as I recollect, at first lived together as one family—Mr. Mount and Mrs. Pick, then having become his wife, and George Pick and Miss Mount. So Mr. Pick made known that he was intending to claim the real estate and I spoke of the possibility of the Crown making a claim and this plan was adopted between them by a common understanding between them that Mr. Pick should appoint Mr. Edwards who would go into possession, take possession and hold possession for him when he should become administrator of the personal estate. Shortly after that, pursuant to the instructions I got, I drew a power of attorney and the two gentlemen met in my office and it was executed and delivered in my presence by—well, that I am not going to be sure about—I will take back that part, delivering, I don't remember actually handing over, but they two met in my office and it was signed in my office.

Q. And it was drawn in accordance with instructions, I presume? A. Yes, pursuant to instructions.

Q. Did you make a copy of it? A. That I can't speak of with any positiveness, although my impression is there was but one copy of it prepared.

Q. And I presume it didn't remain with you? A. If it did I have not seen it. I have made some search for it and I haven't found it in my papers."

On his cross-examination Judge Gregory was asked as to his recollection as to the defendant having signed the

power of attorney. His evidence on that point is as follows: Q. The plaintiff signed it, did he? A. He did, and I think Mr. Edwards alone signed it.

Q. Are you sure of it? A. Well I feel sure of it in my mind.

Q. Why should he sign it? It isn't usual? A. No, but I can recollect what I had in my mind at the time I drew the power of attorney and reasons why Mr. Edwards would sign it, and I think Mr. Edwards did sign it in my office at the same time Mr. Pick did.

Q. But you won't undertake to say he did sign it? A. I can't certainly remember his taking the pen and writing, but I know what point I had in my mind when it was drawn and why he should sign it. I endeavoured to make one document do. I think there were covenants in it for Mr. Edwards to account to Mr. Pick and I think more than that the time to account and how often and when he should do it, and I was making one document do the appointment of Mr. Edwards and the accounting. This I am speaking of from my recollection, and while I cannot remember distinctly his taking the pen and signing, but drawing the document that way I don't think I would let them out without it." Judge Gregory's charge for the power of attorney is entered in his book under date February 26th, 1880, as follows: "George H. Pick, Dr., 'To consultation with him at Mr. Edwards' house re Miss Mount's property, drawing power of attorney to Mr. John A. Edwards, &c., &c., \$10.00."

The plaintiff's evidence on this point is as follows: "Q. Give us your best recollection as to what was said if you can? (This was at the consultation with Judge Gregory.) A. After discussing the points in connection with the matter and my relation to the property and my connection with the family and being the only person who could stand at all to look after the interests of Sarah Mount in any way, there being no known heirs of any kind, Mr. Gregory was asked his advice as to the best course to pursue, and on his recommendation that Mr. Edwards administer the personal estate and I give Mr. Edwards a power of attorney to act and hold the property for me. Q. You asked Mr. Gregory his advice? A. Yes. Q. And this is what he told you? A. Yes. Q. What was it? A. That John A. Edwards administer on the personal estate and that I give

John A. Edwards a power of attorney to hold the property and act for me. Q. When you say "the property," what do you mean? A. I mean the house and land on Queen Street near Carleton in this city. Q. Formerly occupied by Sarah Mount? A. Formerly occupied by Sarah Mount." The plaintiff says there was another meeting at Judge Gregory's office the following day. Mr. Edwards consented to administer, and afterwards the power of attorney was made out. His evidence then proceeds: "After the power of attorney was made out Mr. Gregory read it over—it was satisfactory. Q. Read it aloud to both of you? A. Read it out and handed it to me to sign and I signed it and I have no recollection of Mr. Edwards signing it, no positive recollection, but after the whole business was done I made the remark, 'Now, what shall I do with this,' and Mr. Gregory said, 'Give it to John,' and I handed it to John Edwards in his presence. Q. That is the defendant? A. The defendant." The plaintiff says that he has never seen the power of attorney since. He left Fredericton for Moncton immediately afterwards, and according to his own account from that time to this had never had any conversation with the defendant on more than two occasions. In addition to this direct and positive evidence we have the testimony of Mr. Smith and Mr. Allen, both professional men, without any interest whatever in the result of this suit. It seems that in December of last year the city treasurer of Fredericton finding the taxes on this property for the years 1901 to 1905 in arrears, and having heard that the plaintiff had some interest in the property, wrote to him about the taxes. The result was that he paid the whole amount, \$183.35, on the 16th January last. He had, however, consulted Mr. Smith in December and as a result Mr. Smith at his instance went to Fredericton to see the defendant. The precise object of the visit is not very clear; it certainly could not have been to accomplish any settlement, for up to that time there had not been a word between the parties; they had neither met nor corresponded and the defendant's present attitude as to the property he had not made known, at all events directly or indirectly to the plaintiff, or, so far as there is any evidence, to any one else. Smith, however, did go to Fredericton on the 18th December, and, after making some searches at the registry office in order to find the power of attorney, and inquiries at the city treasurer's office in order to find out about the taxes,

he brought about an interview with the defendant. His account of what took place is as follows: "I first passed the time of day with Mr. Edwards and so on. He and I had been old friends, and then I asked him if he was aware that there were certain taxes due upon this property in dispute, but I mentioned the property and Mr. Edwards said that there were no taxes due that were not to be met by bills that he held against the city, and he informed me that he was an alderman; and then I asked him if he proposed to account to Mr. Pick for the rents and profits and for the disbursements. He said he didn't. Then I asked him if he didn't know he had taken a power of attorney from Mr. Pick and that he had entered into possession of the property as agent for Mr. Pick and he said he did. Then I asked him if he had the power of attorney. He said no, he couldn't say he had; it might be among his papers somewhere, but he couldn't remember anything about it. Then I asked him to the effect if he thought Mr. Pick was a fool, and he didn't express any opinion on that point. Then I said to him words to this effect: Mr. Edwards, how does it happen that the assessment in the clerk's office is put 'Mount estate, per J. A. Edwards, agent?' 'Why,' he said, 'I am agent.' 'We'll, said I, 'for Mr. Pick?' He said he didn't wish to be considered as having answered that in the affirmative. Then I asked him who he was holding for if he was agent for some one. He didn't answer that question except to say he wouldn't answer me anything further until he had seen his lawyer. Then I asked him when he would see his lawyer, and then he said he wanted to see George Gregory, and I told him that I had seen Mr. Gregory the night before on the train and that Mr. Gregory had told me that he had drawn a power of attorney which he, Mr. Edwards, had executed. 'Yes,' he said, 'but I want to see what George Gregory has got to say about it.' Said that two or three times and finally he said he would not recognize any right of Mr. Pick's to an account, but that he would see a lawyer and that he would meet Mr. Pick and myself at the Brunswick House, a hotel in Moncton, on the 5th January, that he was coming up to be at Moncton there by appointment with some one—didn't say who—that is last January, and upon my asking him what time we could meet him he said 12 o'clock noon; if Mr. Pick and I would go to the Brunswick Hotel he would be there, and that closed the conversation." On his cross-ex-

amination Mr. Smith made some important additions to this narrative, which he said had escaped his recollection at the time. He said: "In the first interview when I asked him if he hadn't taken a power of attorney and gone in under that power of attorney, he said 'Yes,' and it was signed in George Gregory's office, and that he had accepted it and taken it from Mr. Pick. 'Q. Will you swear he said he had accepted it? A. I will swear most emphatically. Q. You know that Mr. Edwards said in addition to what you have said that he had accepted the power of attorney? A. Yes, and had had it given to him by Mr. Pick in Mr. Gregory's office—George Gregory's office is how he called him. Q. Can you explain how you can recollect that? A. Well, I can't say I did forget it, but it hadn't come to my mind. It is now firmly fixed in my mind and as a matter of recollection I state it. Q. Were there any others present at the time? A. No, there were none present but him and me at the time, and I think that was the second time. Q. How did he come to make the statement he had accepted it? A. I don't know. Q. Was it in answer to a question you put to him? A. No, it was not; he just said it in that way, that he had accepted it and that Mr. Pick had given it to him and that he had entered under it. He didn't use the words, 'I entered under it,' but 'I went in under it.' Q. You change that now? A. That is what he said, 'I went in under it.' Q. All these odd terms you have forgotten until both counsel got through examining you and now it occurs to you to remember he said he not only accepted it but entered under that power of attorney? A. I say he did not say 'entered,' but 'went in.' Q. He used that term did he? A. Yes, he didn't use that till I asked him. I asked him if he entered under it and he said, 'Yes, I went in under it.' Q. But the accepting part was his own statement? A. He used that word without any suggestion from me whatever. Q. But the entering under was stated at your suggestion? A. The going in, in answer to a question of mine. Then I asked him if he thought Mr. Pick was a fool."

The defendant did not keep his appointment for the 5th January at Moncton, but he wrote a letter to Mr. Smith, dated 4th January, explaining why he was prevented from doing so. No other time having been arranged Smith came to Fredericton on the 23rd January to see the defendant again. I think I may safely say that his object in making

a second visit was to bring about a settlement between the parties, for he came armed with a written offer, which, however, is not in evidence and is unimportant. A second interview took place, but it resulted in nothing, for at that time the defendant seems to have repudiated all liability.

Before commencing this suit a formal demand for an account and a formal notice cancelling the power of attorney were served on the defendant by Mr. Charles H. Allen at the instance of Mr. Chandler, the plaintiff's solicitor in this suit, on the 7th March last. On his examination by Mr. Chandler at the hearing, Mr. Allen said as follows: "I went in the post-office and saw Mr. Edwards and asked him if he was the agent of George H. Pick in connection with the Mount property, and he said he was, and I handed him the two copies of the papers, revoking the power of attorney and demanding an accounting, and I waited for a reply, and I told him what they were—I think that I was serving them for you—and he said you were going to a lot of trouble for nothing; he said he would look into it. Q. This was on the 7th March? A. The morning of the 9th March. Q. What you asked him was whether he was agent for George H. Pick in connection with the Mount property? A. Yes. Q. He said he was? A. Said he was." Mr. Allen says that the defendant was not engaged with any other people at the time, though he is not prepared to say that there were not others present in the apartment. The defendant meets the evidence of Mr. Smith by denying the truth of it except in some minor matters, and he meets the evidence of Mr. Allen by saying that he never heard any such questions asked him as Mr. Allen speaks of.

I shall not attempt the impossible task of reconciling the statements of Mr. Smith and those of the defendant. They relate to incidents of so recent a date and to matters in which both—one professionally, the other personally—were at the time so interesting themselves that it would be little less than a farce in the administration of justice to charge up these discrepancies to the mere frailties of human memory. The defendant's account of the interviews between the plaintiff, Judge Gregory and himself, differs in some respects from Judge Gregory's recollection of it. He speaks of the consultation at his father's house immediately after Miss Mount's funeral, the meeting at Judge Gregory's office on the following day, and the reasons for his selection as a

petitioner for letters of administration. His evidence as to the real estate is as follows: "Q. What else was talked of at your father's house? A. Well, the property was talked of. Q. Do you mean the real property? A. I mean the real property by Judge Gregory for Mr. Pick to get hold of it in some way and there was a power of attorney talked about and I listened to everything, and Judge Gregory about conducted the whole business, suggested everything and moved in everything. I didn't have very much to say about it, but this power of attorney was talked about in my father's house. Q. And did you meet subsequently with Mr. Pick or Mr. Gregory or any one about the matter, and if so, where? A. Well, I haven't a clear recollection, but I have a recollection of being in Mr. Gregory's office the next day, and I have a recollection of this document being talked about, or prepared—a power of attorney—but I have no recollection of the document being read there or being signed or being handed to me. I have no recollection of ever having the document or ever seeing it or ever hearing it read, from that day to this." In other parts of his evidence the defendant swears positively that he never signed any power of attorney, never acted under one, and never had any in his possession.

The evidence from which I have quoted at some length leads me to the conclusion that the power of attorney was in fact executed by plaintiff and defendant and delivered as the plaintiff and Judge Gregory say, and I so find as a fact in this case. Judge Gregory's recollection of the facts seems clear and positive. Unaided altogether except as to the date of the transaction, he is able to recall the circumstances out of which this dispute has arisen. In fact, these circumstances are so exceptional in their character that even after a lapse of so many years they could scarcely be forgotten even by one who had no more than a professional interest in them. We have the defendant's own admission that Judge Gregory, who had known both parties for a long time, was called in to advise them what to do about the estate. Neither of them had, or pretended to have, any legal right to the land. The plaintiff did put forward a reason why in the failure of next of kin he should have it. The defendant at that time neither objected to this claim nor put forward any of his own. He admits that one of the subjects discussed and submitted for Judge Gregory's opinion

was that the plaintiff wanted "to get a hold of this land in some way," and it was in this connection that this question of a power of attorney came up. In other words I should say that was the means which Judge Gregory suggested for the purpose. It is reasonable to suppose that when the Judge advised the course to be adopted, and which was adopted to secure the administration of the personal property to the defendant, his advice as to the means to be adopted to enable the plaintiff to get hold of the real estate would also be adopted. He says it was so, the plaintiff says the same, and the entry in the book corroborates it. I think, therefore, and so find that when the defendant went into possession he went into possession for the plaintiff as his agent under this power and subject to a liability to account for the property.

I will briefly refer to evidence relied on by the plaintiff as shewing positive acts by the defendant under this power of attorney. In addition to the admission proved by Mr. Allen and the more important and circumstantial admissions proved by Mr. Smith, and which if accepted in their entirety are ample evidence of agency, there is a piece of testimony by Judge Gregory to which I will refer. He says that on the 21st April, 1880, by instructions of the defendant he drew up a special lease of this property in duplicate as between George H. Pick and Annie Williams and that he attended to the execution of that lease by Miss Williams. The entry in his book is as follows: "George H. Pick, per J. A. Edwards, Dr. To drawing special lease of property in Queen Street in duplicate to A. Williams, \$6.00." Miss Williams was a milliner who had purchased Miss Mount's stock and was then commencing business in these premises, where she continued for some years. On his cross-examination, Judge Gregory was asked as follows: "Q. He never acted on it, did he (i.e. the power of attorney)? A. Well, he did once act upon it I would say. That lease to Miss Williams was on it. Q. Wasn't that lease J. A. Edwards to Miss Williams? A. No, it wasn't, at least it is George H. Pick by J. A. Edwards. Q. Is your memory pretty certain as to that? A. My memory is pretty clear and my entry confirms me. Q. Wouldn't it be more from your entry than your memory of it? A. No. When it was just done, and for a while afterwards, my mind often referred to the transaction of the property, and I know Mr. Edwards had that

done and I don't think Mr. Edwards got me to do anything more afterwards with respect to the property." In view of this evidence and the entry in Judge Gregory's books, the defendant was compelled to admit its correctness and that this lease had actually been prepared by his directions and executed. In addition to this later on in the same year Judge Gregory, on the defendant's instructions, searched the title to this property, furnished him with an abstract of it which he sent to the plaintiff, and which the plaintiff produced at the hearing. The plaintiff also produced two letters from the defendant to him, one dated March 4th, 1880, and the other dated April 26th of the same year. In the first, among other things, the defendant says: "The matter is only about as you left it, as the Probate Court has ordered a citation which you will see by to-day's Telegraph. I look in the store every day to see that all is right, but have not touched anything as yet. I have had some applications for the shop and house, but will not be able to get over \$200 for it this year, as there are a great many vacant shops on the front street and likely to be more, but if I can get a tenant suitable I will be well satisfied just now. After a time when I have funds to improve the place with, there will be no trouble, and even now if a party I am negotiating with takes it I will have to do a little in the fall. Whenever I am in a position to give you further information I will write. Mrs. Mount wrote a very sensible letter, and altogether different from what I expected. She looks upon your claims most favourably and justifies your action. I shall take care of the latter as it may be useful some time." In the other letter the defendant speaks of his appointment as administrator, his sale of the stock, and some other matters in reference to the estate. He says: "I have sold the greater part of the stock, a portion of it to a Miss Williams, to whom I have rented the house and shop for one year for \$200—the very most I could get for it, and when I see a dozen or more good shops vacant I think it is not so bad. I have had to re-insure the property, one-third payable to Mrs. Mount in case of loss. I have sent her the balance due her on the quarter's rent due 1st May. I will have to give these tenants some paper for two of the rooms, and some other little things will have to be done." These letters are said to be of no importance, but do they not support the plaintiff's case? Are they such letters as one who had just taken possession of

this property, to use the defendant's statement in his answer as "owner in fee," who was holding it for himself adversely to the plaintiff and all the world, who was accountable to no one, would naturally write to the plaintiff, who, according to him has not now, had not then, and never had since, the slightest interest in the property whatever? Place the defendant, however, in the position which, according to the plaintiff, he actually occupied, and what is more natural than that he should inform him of the renting of the property, the name of the tenant, the amount of the rent and how it was disposed of, the insurance on the house, the allowance to the tenants for the room paper, and tell him that whenever he was in a position to do so he would give him further information? Then there is the other fact that the defendant actually, from 1880 to 1902, kept an account of this property, not in his own private books, but in a book for the special purpose and for the estate account. That is altogether in the way of his duty if he was an accounting party such as the plaintiff claims, but unusual if he were not.

The fact being then ascertained that the defendant did enter into possession of this land under the plaintiff as his agent to hold it for him and to account to him for it, what terminated that relation before the plaintiff himself cancelled it, and if not terminated, how can the defendant as against the plaintiff dispute his title? In *Smith v. Bennett*, 30 L. T. N. S. 100, it was held that so long as an agent is in receipt of the rent of land the Statute of Limitations will not run against his employer; and if a person commence to receive rents as the agent for another and afterwards continue to receive such rents, without paying them over, he must be presumed to receive as agent till the contrary is shewn. (Reference to *Barwick v. Garrick*, L. R. 5 Ch. 243. and *Lyell v. Kennedy*, 14 App. Cas. 437.)

In my view it is quite impossible for one acting in a fiduciary position as to property as this defendant was towards this plaintiff, to acquire any right growing out of its possession such as this defendant sets up in this case, until that fiduciary position has been terminated. To hold otherwise would be to permit a trustee holding a possession for his cestui que trust in direct violation of his trust, to go on building up a title in himself. (Reference to *Williams v. Potts*, L. R. 12 Eq. 149; *Attorney-General v. London Cor-*

poration, 14 Jur. 207; Dixon v. Hammond, 2 B. & Ald. 310; Zulueta v. Vincent, 1 D. M. & G. 315.)

Though the Statute of Limitations is not set up as a defence, the defendant's counsel did contend that the delay in taking proceedings and the lapse of time amounted to laches or acquiescence such as to be a bar to the plaintiff's claim, and that in determining that question this Court would act by analogy to the statute. That the plaintiff, ever since the inception of this transaction, has shewn an indifference in regard to this property and its management by the defendant, is certainly a strong circumstance — unexplained as it is—to shew that the transaction itself was not what he sets up. And in determining that question of fact I have not lost sight of that point. I cannot, however, agree that this amounts either to acquiescence or laches such as to defeat this action. The contest is between the original parties—no rights of third parties have intervened—the defendant has the account and can give it and prove it as well to-day as ever he could. He at all events has not been injured by the delay. Proceedings were taken as soon as knowledge came to the plaintiff that the defendant had disregarded his duty, by permitting the taxes for five years to be in arrears, and when he had on a demand for an account refused to give it, and he had repudiated his agency altogether. Besides this the relation in which the parties stood to each other under the power of attorney must not be lost sight of. It is settled by a long series of authorities that where an express trust has been created, as I think is the case here, lapse of time is no bar to an action for an accounting. (Reference to *Barwick v. Garrick*, L. R. 5 Ch. 232; *Chalmer v. Bradley*, 1 J. & W. 51; *Cholmondely v. Clinton*, 2 J. & W. 190; *Sear v. Ashwill*, [1893] 2 Q. B. 390; *North American Land Co. v. Watkins*, [1904] 1 Ch. 243, [1904] 2 Ch. 233.)

These last two cases seem to have arisen after 1890, when s. 8 of the Imp. Act, 51 & 52 V. c. 59, of which s. 50 of c. 162, C. S. 1903 is a copy, came into force.

There must, I think, be a decree declaring that the defendant has held the property up to the 7th March last, when the power of attorney was cancelled, as an express trustee for the plaintiff, and that it be referred to a referee to take an account of the defendant's dealings with the property during that period on that footing.

NEW BRUNSWICK.

BARKER, J.

DECEMBER 18TH, 1906.

THIBIDEAU v. CYR.

Sale of Land—Parol Agreement—Conflict of Evidence as to its Terms—Part Performance—Statute of Frauds.

BARKER, J.:—This bill was filed for the specific performance of a verbal contract for the sale of a lot of land at Madawaska in the county of Victoria. The lot in question contains 100 acres; it fronts on the northern side of the River St. John, at or near the winding ledges so called. The Temiscouata Railway runs across the lot along the bank of the river and the highway road also crosses the lot a short distance to the north of the railway. The small piece of the lot between the railway and the river is of little or no value; it was conveyed by the defendants to one Thomas J. Cochrane on the 8th August, 1902, for the sum of \$2. It is a bluff inaccessible from the river and cannot be reached from the highway without crossing a portion of the remainder of the lot or the land of the adjoining proprietor. The land between the railway and the highway comprises about eleven acres, and it is in reference to this that the dispute between the parties has arisen. Its value, as stated by the witnesses, varies from \$50 to \$100. There was at this time (1902) a prospect of a dam being built at these ledges with a view to the erection of saw mills and the establishment of a large lumber manufacturing business there. In contemplation of this, Cochrane, one of the parties interested in this venture, not only secured the strip of land already mentioned, but also an option from the defendants for the purchase of that part of the lot lying between the railway and highway now in dispute. This option is contained in a written agreement signed by the defendants, dated August 8th, 1902—the same day as the conveyance of the land on the shore—and it secured to Cochrane and his associates a right to purchase at any time within three years for a sum

calculated at the rate of 55c. per square rod. This agreement was executed and acknowledged before Mr. Pelletier, justice of the peace, and it was registered on the 30th August, 1902. Cochrane's object in buying is stated in the agreement to be the "location on the land of a mill or mills, houses, outhouses and any other building or buildings which may be thought necessary for the purpose of and in connection with a mill or mills." Such was the position of things when the parties to this suit entered into negotiations for the purchase of the lot. The plaintiff wishing to buy a farm, sought out the defendant, who, as he had heard, was desirous of disposing of this lot. This was sometime in August—the precise date does not appear—but it must have been very soon after the defendants and Cochrane had completed their arrangement. According to the evidence of the plaintiff, the defendants wanted \$400 for the part of the land north of the highway road, and he offered and was willing to give \$400 for the whole lot. The defendant told the plaintiff of the option and pointed out to him that he could not sell the land included in it until after the three years had expired. The plaintiff says that he then offered to give \$350 for the land to the north of the highway and \$50 for the rest if Cochrane did not purchase, but that the defendant refused to accept this. The plaintiff says they were about separating as they were unable to agree upon terms, when Cyr suggested "splitting the difference" in settlement of the matter, and to this he agreed. And he says that the arrangement, as thus agreed upon, was that he was to buy the whole lot for \$400—that is he was to pay \$375 for the part north of the highway, \$200 in cash and the balance of \$175 within four years with interest at the rate of 8 per cent., and that if Cochrane did not purchase under his option, the defendants were to convey to him, the plaintiff, the remainder of the lot for \$25. The plaintiff had no actual knowledge of the conveyance to Cochrane at this time, and the defendant did not mention it, but later on the plaintiff says he did tell him of it and said he would pay Cochrane back the \$2 he had paid and get the property, assuming, I suppose, that in the event of the milling scheme falling through, this small strip of land would be useless to Cochrane. Taking the evidence of the plaintiff by itself, it establishes a concluded agreement for the sale and purchase of this lot upon the terms I have mentioned. Outside of any

speculative value arising from the prospect of a large milling business being established there, the actual value of the whole lot at this time did not exceed \$300 or \$350 at most. The plaintiff paid the \$200 as agreed upon; later on \$25 was paid for him by his brother; and later on the balance of \$150 with interest as agreed upon. That part of the agreement was then completed and the defendants, by deed dated April 7th, 1904, conveyed to the plaintiff that part of the lot lying to the north of the highway. Cochrane did not exercise his right of purchase, and when the three years expired the plaintiff tendered the \$25 and demanded a conveyance of the remainder of the lot except the small strip on the shore which the plaintiff was willing to abandon, but the defendants refused to give it. There is no doubt that immediately the bargain was completed the plaintiff was put in possession and actually entered into possession of all the land north of the railway and continued in such possession up to 1905, and there is no dispute that this possession is solely referable to the agreement whatever it was. During the years 1903, 1904, and 1905 the plaintiff repaired the fences, took the crop off the land, paid the taxes and enjoyed the premises as fully as an actual owner could. There is, therefore, ample evidence of a part performance sufficient to take the case out of the Statute of Frauds. The only question to be determined is, what in fact is the agreement which the parties entered into. The defendant says it was this. It related solely to that part of the lot north of the highway for which the plaintiff was to pay and has paid \$375, and that in addition to the land at this price he was to give and did give the plaintiff the use and profits of the land now in dispute for the three years or until Cochrane purchased, if he did purchase, and that if he did not purchase then he, the defendant, in case he wished to sell this eleven acres, was to give the plaintiff a preference, that is the first offer. The plaintiff and his wife and the defendants all gave evidence. In all material points the plaintiff and his wife are contradicted by the defendants, and if the case rested there the plaintiff's bill ought to be dismissed. There is, however, other independent testimony, and if the plaintiff's version of this contract is corroborated by this testimony and the surrounding circumstances, so as to leave no substantial doubt of its accuracy, then the plaintiff ought to have a decree. The defendants rely altogether upon their own testimony.

The plaintiff has produced four witnesses to whose evidence I will briefly refer. Joseph Berube is the owner of the adjoining lot, and he gives the following account of an interview with Cyr in reference to some fences between the two lots, which took place in the fall of 1902. "Q. You had some talk with Mr. Cyr about repairing the fence there? A. I was coming down about 15 acres below my place walking along the line, and Mr. Cyr came up behind me and I told him that I would require to fence from the highway to the railroad. Q. What did Mr. Cyr say? A. Mr. Cyr said I had no more business there now, from now until the dam was built it was Mr. Thibideau's; if the dam is built you will have to do with the Dam Company; if the dam is not built it will still be Thibideau; all the business I have with it is to get my money from one or the other."

Louis Pelletier was the next witness. He is a justice of the peace and a man of some prominence in that part of the country. He had witnessed the execution of the option to Cochrane and in that way knew of its contents. The evidence shews that on several occasions the plaintiff had urged the defendants to give him a written paper containing the terms of their bargain. This he always refused, taking refuge behind his honesty and saying that he was "a man of one word." At the same time he never seems to have denied the agreement, as the plaintiff stated it, until after the \$375 had all been paid, and when it had become highly improbable that Cochrane would purchase within the three years, or that the milling scheme would be carried out. The interview to which Pelletier's evidence relates took place at the time the deed to the plaintiff was executed in April, 1904. It seems that by mistake this conveyance described all the land north of the railway, and a change had to be made in it so as to include only the land north of the highway road. Pelletier's evidence is as follows: "Q. Will you explain how it comes this change was made? A. The change was made because, in 1902, there was a company took an option on the piece of land and the option was for three years and the paper was taken before me as a magistrate, so when I came to read the deed I found that it was bounded by the Temiscouta Railway. I said we couldn't go any further with it, and so Mr. Cyr said the same; he couldn't sign the deed because it was bounded by the track. Q. You said first, and then he said? A. Yes, because I saw the boundary first, and

then he asked me to read the whole paper, so I read the whole paper. Mr. Cyr said he couldn't sign that because there was an option on that part from the road to the Temiscouta Railway. Q. Then what did you do? A. Mr. Thibideau said, when he came down to see Mr. Michaud to have the deed prepared, that he explained for the first part, the north part of the road, and explained the south part and Michaud misunderstood, so if Mr. Cyr would sign the deed it would be all right, the company could take possession of the land but it would be all right, but if not he would keep possession. Q. What did Mr. Cyr say to that? A. Mr. Cyr said he couldn't sign but he was a man who would keep his word, and that it was agreed to the conditions they had together. Q. What Mr. Thibideau said? A. No, it would be agreed according to their conditions they had made before. Q. Mr. Thibideau, before this, had stated that he was to have it after three years—had stated what the bargain was in his opinion? A. Mr. Thibideau said he had bought the northern part for \$375, and the south part for \$25. Q. He said that there? A. Yes, for \$25. Q. Did Mr. Cyr hear that, there in this room? A. Yes, quite close there. Q. What did he say to that? A. He said it would be agreed the deed according to the conditions they had made. Q. He didn't deny the statement of the contract as made by Thibideau? A. No."

On his cross-examination he said that after Thibideau has said the upper part was \$375, and the lower part \$25, Cyr answered: "I am the man to keep my word; when the time was expired after three years it would be all right according to the bargain."

Baptiste Michaud says that Cyr was at his shop one day in the fall of 1902, when the following conversation took place: "Q. What took place? Did you ask Mr. Cyr something, or what? A. I asked Mr. Cyr if he had sold his lower farm. Q. Had he another farm somewhere else in the parish? A. One above. Q. What then? A. He says, yes I have sold it for \$375. I said, at the end of three years if the dam is not built Mr. Thibideau has a right of \$25 to the other piece. Q. What did Mr. Cyr say to that? A. He said yes. Q. What was the words? A. Had a right on that piece of land for \$25.

On his cross-examination he was asked what he meant when he asked the question, Mr. Thibideau had a right on

that land for \$25, to which he replied: "I had heard tell Mr. Cyr was asking \$400 for his piece of land. I wanted to see if it was on the same conditions he had asked. Q. What did you mean by the words, 'Did Mr. Thibideau have a right on that piece for \$25'? A. Because it made that piece \$25, because he was asking \$400 for the whole thing. Q. You are absolutely certain the sum of \$25 was spoken of? A. Oh yes."

Mathias Thibideau, a brother of the plaintiff, also gave testimony. In 1903 he went to the defendant to pay him \$25 for his brother on account of the purchase money. His evidence as to what took place is as follows: "Q. Did you pay Mr. Cyr \$25 for your brother? A. Yes sir. Q. What was said between you at that time about the trade or bargain between Mr. Cyr and your brother? A. I told Mr. Cyr I had come there to pay him \$25 for my brother. I told him I don't know your bargains, but my brother asked me to pay \$25 for him. Mr. Cyr said, we have made no more bargains than that I give him the north of the road for \$375; between three or four years. I ask him, you are not selling the other piece? Mr. Cyr said, I told him I would sell the other piece after three years if the Dam Company did not build. I told him I couldn't sell before that because I have given papers on that for three years. Q. Did he say at the end of three years he would give your brother a deed? A. He did not mention a deed. Q. Did he mention the price he was going to get for the lower half? A. He told me he would sell to him at the end of three years if the Dam Company did not build for \$25. Q. Did Mr. Cyr say he had told Henry Thibideau he would sell it to him for \$25? A. He told me he had sold it to him. Q. To whom? A. To Henry Thibideau. Q. Mr. Cyr said he had sold it to Henry Thibideau for \$25? A. After three years if the Dam Company did not build."

These interviews were not brought about by inquisitive meddlesome persons simply to satisfy their curiosity as to their neighbours' private affairs and their own love for gossip. They were far removed from that. These witnesses have no interest in the result of this suit and three of them have no connection whatever with any of the parties to it. They gave their evidence in a way which entitled it to credit, and I think I ought to give effect to it. It corroborates the plaintiff's version of this agreement, not only as to the fact of sale but also as to the \$25 to be paid for this disputed land,

in case of Cochrane failing to purchase. The defendant Cyr meets this evidence simply by swearing that it is all false. Question after question was asked him as to the truth of various statements made by the plaintiff and their witnesses. The answer was the same in every case. There are upwards of forty of such questions. This evidence did not impress me very favourably.

There are one or two other points deserving of consideration. When the plaintiff commenced these negotiations it is clear that he was seeking to purchase the whole lot, and that \$400 was the extreme figure to which he was prepared to go. There is very strong evidence also that this was the sum which Cyr had been asking for it, though that sum is higher than the value as fixed by several of the witnesses. Cyr had just given an option on this eleven acres which, if carried out, would net him some \$968, and he seems at that time to have had no doubt of the Cochrane Company going on with their works; in fact he still entertains that expectation. It was clear, therefore, that if he were distributing the \$400—one part of which was to be paid for, the remainder of the lot in cash and which could be conveyed at any time, and the other part of which was to represent the purchase money of this eleven acres, it was to his advantage to make the cash payment as large as possible. In this way he would in any event get practically the value of the whole lot, and if Cochrane purchased, as he expected he would, there would be a clear profit of well on to \$1,000. He therefore uses the following argument to the plaintiff to induce him to pay \$375, instead of which he offered the \$350. He pointed out to him that the value of the remainder of the lot would be so substantially increased by the erection of these mills that \$400 for it would be a low price. That this would be the result seems to be admitted by all. Mr. Cyr admits that he used this argument in this way, but he says that the defendant does not state it fully. The question one would naturally ask in reply is, "But what if Cochrane does not purchase, and this mill scheme amounts to nothing?" If the defendant's version of this transaction is true, this argument amounts to nothing to the plaintiff. He, however, says they were bargaining on the basis of \$400 for the whole lot, but disagreeing as to whether more than \$350 should be paid for the part north of the road. Defendant's argument was, it makes no difference to you if you do pay a high price for that, because if the mills are built the land you will have

will be increased in value beyond what you will pay, and if they are not, you will then have the whole lot for the \$400, which you are willing to pay for it.

There is another circumstance, as related by the defendant, which seems unusual. It is in reference to the possession of the eleven acres and its use for the three years. He says that they disagreed as to the \$50, and his wife suggested dividing the difference. They were driving on the road at the time, the defendants in their carriage, and the plaintiff and his wife in their carriage. The defendant says: "After we were down a piece I turned towards him, he was behind me with his team, and I told him if he was willing we would divide the difference in two. He says that way we could make a bargain. I told him that I would give him the piece at the south at his own profit for three years; I told him after three years I would give him the preference of buying. We would make some other bargain." It seems unusual that without suggestion from anybody, without anything being said as to the possession of this eleven acres, and if the defendant's account is correct, without anything being said as to the sale of the eleven acres, that the defendant, who was seeking to get all he could, should voluntarily give him the use of the land for three years for no purpose, and then give him the preference of buying. The possession for the three years is entirely consistent with the plaintiff's case, for the defendant had practically sold the eleven acres. If Cochrane took it he got his \$900 odd and he had nothing more to do with it. If Cochrane did not, then the plaintiff had it under the agreement for the \$25. It was precisely as he told Berube—"all the business I have with it is to get my money from one or the other."

I think the plaintiff is entitled to a decree with costs. It will, however, be confined to that portion of the lot between the railway and the highway, as described in the conveyance tendered for execution. The small piece conveyed to Cochrane had been sold before these negotiations commenced, and though the agreement may have taken place in reference to the whole lot, the plaintiff seems to have been willing to abandon that small piece which is only worth a few dollars at most, too insignificant a sum for a reference, even supposing that the plaintiff was entitled to compensation for it, and he has not asked for that.

NEW BRUNSWICK.

LANDRY, J.

SEPTEMBER 29TH, 1906.

DAY v. MILES.

Negligence—Fall of Scaffold—Defective Construction—Want of Inspection—Contributory Negligence.

Trial of action before LANDRY, J., without a jury.

A. W. MacRae, for plaintiff.

H. A. McKeown, K.C., and J. D. Hazen, K.C., for defendant.

LANDRY, J.:—The plaintiff stood on a scaffolding built by the defendant's orders, working at the eaves of the roof of a building being repaired by the defendant's men, of whom he was one. The plaintiff fell to the ground from the scaffolding, a distance of about fifteen feet, and was injured. He claims that the fall was the result of negligence on the part of the defendant in constructing the staging which he alleges broke down, carrying him with it, by reason of such defective construction.

He proved that he had been engaged by the defendant to work on the building, using the alleged defective staging for that purpose.

The negligence relied on was that one of the cleats to which the scaffolding was fastened had not been sufficiently nailed to the side of the house. One witness, on behalf of the plaintiff, said that almost immediately after the accident, he being at the place of the accident, picked up a piece of one-inch board, two feet long and six inches wide, in which some nails stood driven in such a way as to leave the head of the nail about an equal distance from the board to the distance occupied by the point of the nail. In cross-examination, however, he did not adhere strictly to that description as to the manner in which he found the nails. Other witnesses said that the safest way to secure a scaffolding to a building such as that was to put a board lengthways instead of cleats, and, as experts, maintained that it was more safe to drive the nails home in any event than to leave the heads

out sufficiently far from the board to admit of the claw of an ordinary hammer being used to draw the nails out.

The main dispute as to facts was whether the nails in the cleat that fell were driven as first declared to have been found by the first witness mentioned above, or whether driven so far as to leave room only for the hammer to get under; and as to how the falling of the plaintiff happened.

The plaintiff contended that the nails had been driven in that cleat as represented to have been found in that inch board after the accident, and that the staging, in consequence, broke down while being used for the purpose intended, and that the plaintiff fell with it. The plaintiff further claimed that even if driven as the defendant said they were driven, it was negligence not to have them driven home. The defendant contended that the nails in the fallen cleat had been driven home, save and except as to leave room for the claw of an ordinary hammer to get under the head, and that such a driving was not negligence, as it ensured safety to the men using the staging for the purposes of the repairs going on.

The defendant also contended that the fall of the plaintiff was not occasioned by the falling of the cleat, but that the cleat was detached from its place by the falling of the plaintiff and of the planks of the flooring against the upright and its stay; and that the immediate cause of the falling of the plaintiff was due to the planks that constituted the flooring having been made to slip away from their resting place by the negligence of the plaintiff himself.

On the facts I find as follows: The scaffolding was put up by an experienced carpenter and scaffold-maker; it was put up in a way that is usual, and frequently resorted to by experienced and careful men, for the work for which it was used; the nails were driven sufficiently far to reach through the cleat, the clapboards and the boards on the house to which the scaffolding was attached, but were not driven up to the head, sufficient room being left between the heads and board to admit the claw of an ordinary hammer to catch the heads. I believe there was no want of proper or ordinary care in thus driving the nails, and I conclude that there was no negligence in constructing the scaffolding.

Nor can I find evidence to support the allegation of negligence on the part of the defendant or his foreman in the want of sufficient superintendence of the structure after it

was put up to discover defects occasioned by wear, or use, or accident, or design. The scaffolding, built with reasonable and ordinary care, had been put up but very few days, and both master and foreman had been all over it the day previous to the accident.

I find that the accident was due to the fact that one end of the flooring on which the plaintiff stood, slipped from its support, and the slipping from its support was hastened by the negligence of the plaintiff in unnecessarily swaying, in sport, with a working companion, the staging, a few seconds before it fell.

I cannot conclude that the cleat was, just before the accident, as securely nailed as it was originally; but if not so securely fastened it had become so by accident or design, and the fact was not known to the defendant, nor did it become insecure through any negligence of his or of the superintendent of the work, nor was it negligence on his part that he did not know that it had so become less secure.

I therefore find no negligence on the part of the defendant, nor on the part of any one for whose work he was responsible. I do find that the plaintiff contributed by negligence to the bringing about of the accident, and that ordinary care and prudence on the part of the defendant could not have prevented the accident notwithstanding the negligence of the plaintiff.

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NOVA SCOTIA.

FULL COURT.

CORBETT v. McNEILL.

*Trust—Purchase of Land—Agreement to Share Proceeds—
Statute of Frauds.*

Appeal by the defendant from the judgment of RUSSELL, J., reported 1 E. L. R. 368, argued before TOWNSHEND, J., GRAHAM, E.J., and LONGLEY, J.

F. H. Bell and James Terrell, for appellant.

H. Mellish, K.C., for respondent.

GRAHAM, E.J.—The defendant was concerned in acquiring from different proprietors a number of coal areas at Port Hood which were to be sold to the Port Hood Coal Company at a handsome sum. He saw an opportunity for taking up at the Mines Department two additional coal areas adjoining, which he could get for the statutory fees of \$60 and put those in with the others, and he proposed to take in with him to share in the profits of that transaction former clerks in his office, namely, Ternan, O'Connor, and McDonald. He made the proposal to O'Connor, McDonald being present, to take up two areas, taking these two in free. O'Connor instead, knowing that he could get a Mr. Buckley to go in with them, proposed to take up three areas and to pay in \$30 for an interest in the three areas. He consequently got Buckley to pay in the \$30 and this sum was handed over to the defendant. Buckley says:

"Some one produced a sketch of the areas and there were three areas picked out and I think Alexander McNeil went to take out the three areas that were taken up." He thinks McDonald was in the office but he does not remember. The defendant with this \$30 and \$30 from Ternan (in which his two brothers had an interest) and \$30 of his own, took up in his own name the three areas. Then he gave a declaration of trust to each, namely, one to Buckley for a one-sixth interest in the three areas, one to O'Connor for a one-seventh interest and one to McDonald for a one-seventh interest. This was delivered to McDonald in O'Connor's presence. This occurrence was some time in March, 1899.

The witness O'Connor is corroborated in respect to this matter of McDonald's one-seventh interest by Ternan, a witness called by the defendant. In respect to the declaration of trust given to McDonald he had no knowledge, but he says: "Q. And McNeil would have what was left? A. Originally there were six of us in it, myself and my two brothers, O'Connor, McNeil and McDonald. McNeil and I were putting up \$30 apiece. When we approached O'Connor he got a sixth for himself and Buckley, but Buckley wanted a sixth and he got a sixth and the others divided equally what was left. I think I got five-thirty-sixths. Q. You, McNeil, O'Connor, McDonald and your brothers were to get equal amounts? A. That, as I understood it, was the way it was to be divided up."

O'Connor's evidence is quite circumstantial on this point. He says: "There was a third declaration of trust in precisely similar terms to mine which was given for one-seventh to Finlay McDonald. I have seen it many a time. Q. What did you do with McDonald's? A. It was handed to him in my presence. I have seen McDonald afterwards produce that same declaration of trust, which was on a piece of foolscap paper, the full width of the paper, and perhaps four or five inches in length. I have seen him produce that in the office and offer to sell it in a joking way for thirty cents. It was in McNeil's handwriting and it was under seal."

McDonald remembers very little about the transaction, as he says he left everything to O'Connor. He does not deny getting the declaration of trust, but says if he did

he accounts for its disappearance when all his papers were burned in the fire at Sydney, which is very likely. The defendant admits having given a declaration of trust to Buckley and O'Connor, but says he gave none to McDonald; that McDonald was to be given gratis by him such share as he saw fit out of his own share. The fact that O'Connor's share was admittedly a seventh indicates that there were seven shareholders, but there may be some other explanation.

I entirely agree with the finding of the Judge as to McDonald's one-seventh share and as to the declaration of trust. The three areas were put in at the price of \$27,000 in bonds and in shares. Later, in December, 1899, a sale of all the areas had taken place. The thing was floated but the parties interested—at least those under the defendant—had received nothing.

McDonald wished to realize something out of his share and he authorized O'Connor to do this. O'Connor went to the plaintiff who agreed to give \$300 for one-fourth of McDonald's interest of one-seventh. The \$300 was remitted to McDonald and McDonald's receipt signed by him for the money was given to the plaintiff, who afterwards lost it. The defendant was apprised of this transaction. This entry appears in the share register:

Finlay McDonald, Sydney.

Date.	Certifi-	Transfer	No. of shares	No. trans-
1900.	cate No.	No.	issued.	ferred.
Jan. 5.	28	..	From J. Blacklock	25
Feb. 5.	37	5	To P. E. Corbett	10

There is a power of attorney from McDonald to O'Connor of 17th January, 1900, produced and put in evidence by the defendant, and it is important: "Know all men by these presents, that I, Finlay McDonald, of the Town of Sydney, in the County of Cape Breton, barrister, do hereby constitute and appoint William F. O'Connor, of Halifax, in the County of Halifax, Nova Scotia, my true and lawful attorney for me and in my name, place, and stead, and for my sole use and benefit, to accept all such issues or transfers as are or may hereafter be made unto me of any interest or share in the capital or joint stock

of the Port Hood Coal Company, and to sell, assign and transfer to Patrick E. Corbett, of the said city of Halifax, one-quarter of all such stock or shares.

“Dated at Sydney, this 17th day of January, A.D. 1900.”

The bonds and shares were issued. But a transaction had taken place by which the defendant had paid \$12,500 to money lenders to enable the syndicate to raise the money to pay for the consolidated areas. And the defendant conceived the idea of charging that sum against these three areas. That matter has since been the subject of the action of Fultz v. McNeil, 38 N. S. R. 506, and was not sustained in this Court. When the defendant came to hand over to the original holders of these three areas their shares and bonds he proposed to make a deduction from the amount to cover the sum paid out to the money lenders, and it was seriously objected to, particularly by O'Connor at least. He had produced three envelopes. In the one for Fultz and Corbett (Buckley's assignees) there were \$3,000 in bonds; in O'Connor's \$2,500, and in McDonald's \$2,500. The defendant, after O'Connor's objection, took out of the McDonald envelope a \$500 bond and put it into the envelope for Fultz and Corbett. The company's record book shews an issue of only \$3,000 to Fultz. This took place about the last of January, 1900. The bonds had been for some time with the defendant. But the importance of that transaction is this, that it tends to shew that the defendant up to that time was dealing with McDonald on the basis that McDonald had a one-seventh interest and was delivering him bonds for that share. The same number were delivered for McDonald as were delivered to O'Connor, who admittedly had a one-seventh interest. But he was seeking to charge against it, of course, a proportion of the \$12,500 which he had paid to the money lenders, and failing in that respect he has changed it to the theory of a gift of an undetermined interest.

The defendant contends that there was no consideration between the defendant and McDonald, and that the declaration of trust cannot therefore be enforced.

In my opinion, the money put into it by Buckley for the three of them with McDonald's knowledge constituted

a consideration. McDonald was a party, and O'Connor, his agent, followed up the transaction for him. But it is not necessary that there should be a consideration for the Court to enforce the declaration of trust. (Reference to *Ellison v. Ellison*, 1 W. & T. L. C. 309; *Ex parte Pye*, 18 Ves. 145; *Jones v. Lock*, L. R. 1 Ch. 25.)

2. Then it is contended that there was no writing between McDonald and Corbett, and that the Statute of Frauds requires a writing. This is a case in which the Statute of Frauds should have been pleaded if the defendant wished to rely upon the want of a writing. Application was made to the Judge at the trial and judgment was reserved, but apparently no leave was given. However, I think that the Statute of Frauds does not apply to the transaction between McDonald and the plaintiff. When the trust was declared in the spring a conversion of the areas into money or bonds and stock was contemplated.

Before the transaction took place the areas had been sold, and what McDonald was transferring to the plaintiff was not mining areas, but the proceeds of them. Referring back to the power of attorney and to the share book, it will be seen that it was the bonds and stock which were transferred. But the evidence also shows that the sale had been completed as early as the middle of December, before this transaction, and was represented by bonds and stock. (Reference to *Stuart v. Mott*, 23 S. C. R. 388; *Trowbridge v. Weatherbe*, 11 Allen 361.)

Then there is the evidence of a writing, namely, the receipt given by McDonald, which, according to the evidence, expressed that it was for this share in his interest.

And there is part performance, namely, the transfer of the bond for \$500 from McDonald through O'Connor, his agent, to the plaintiff, and the transfer of the number of shares indicated in the stock book. I am of opinion that the point is not well taken. I do not see very well how McNeil can avail himself of it anyway. If McDonald consented to be made a plaintiff instead of refusing to do so, and hence was put on the record as a defendant, McNeil, I think, could not have raised this point, and I do not see how he can, when the plaintiff is enforcing McDonald's trust.

3. A further point has been taken. It appears that when the defendant insisted on charging the commission of \$12,500 paid to the money lenders against these three areas, notwithstanding O'Connor's protest, O'Connor, as attorney of McDonald, gave the following order:

“Halifax, N.S., Jan. 30th, 1900.

“The Port Hood Coal Company, Ltd., Halifax, N.S.

Dear Sirs,—Please issue \$1,000 of my stock in your Company to Patrick E. Corbett and \$1,500 to myself, and oblige.”

It is contended that this was a settlement. Now, whatever might be said about McDonald, the principal, being affected, it cannot be said that Corbett, the plaintiff, was affected by that document. He had acquired from McDonald before that. But there was no settlement. O'Connor took what he could get, and there is not a word to show that he did not reserve the right to come in for more. What he took was in consequence of McNeil's representation as to what he got for the areas, and this representation was afterwards found to be different from the facts as established. Fultz and Corbett under Buckley did recover more in the action already mentioned.

The only other point in the case is as to the charging against these areas the commission already referred to. The facts in this case are not different in that regard from the facts in *Fultz v. McNeil*, or rather they are much stronger for the plaintiff, and should be disposed of in the same way that they were in that case. Also the matter of the amount of the judgment in cash. S. 19 (5) of the Judicature Act does not apply. This was an equitable interest which was assigned.

The appeal should be dismissed, and with costs.

TOWNSHEND, J., read an opinion reaching the same conclusion.

LONGLEY, J., concurred.

NOVA SCOTIA.

FULL COURT.

JANUARY 7TH, 1907.

REX v. MACK.

Municipal Corporations—Councillor's Qualification—Procedure to Unseat Disqualified Person — Quo Warranto—Petition.

Case stated for the opinion of the Court, the two questions to be determined being, (1) defendant's qualification to be elected and sit as a municipal councillor, and (2) whether his seat should be attacked by quo warranto or by petition; and argued before TOWNSHEND, J., GRAHAM, E.J., MEAGHER, and RUSSELL, JJ., on the 19th November, 1906.

H. Mellish, K.C., for informant.

J. J. Ritchie, K.C., for defendant.

GRAHAM, E.J.:—We have some very stringent provisions in respect to disqualification for the office of mayor or councillor of towns. This is one of them: R. S. (1900), c. 71, s. 26 (2): "No person shall be qualified to serve as councillor unless he is 21 years of age or upwards, a British subject, and a ratepayer of the town, and has resided and been a ratepayer in the town for at least one year next previous to the date of his nomination."

Two things are necessary: (1) The councillor must have been a ratepayer for one year before his nomination; (2) he must continue to be a ratepayer or else he cannot serve. If he cannot serve of course he cannot be a councillor no matter how many votes he had or how solemnly he has been returned. He cannot serve and the return will not help him.

These are the facts in the case agreed on:

"2. On the 6th day of February, A.D. 1906, an election was held, pursuant to the statute in that behalf, for the election of three councillors for the town of Liverpool. The defendant and nine other persons were candidates at such election. The defendant and S. C. West and D. W.

McKay, two of the other candidates, received the largest number of votes and at the close of the polls holden at such election were declared duly elected by the presiding officer.

“ 3. The first meeting of the mayor and councillors for the town of Liverpool after such election was held on the 12th day of February, 1906. The defendant was duly sworn into office as a councillor for the town of Liverpool and at said meeting took his seat as one of the councillors for the said town of Liverpool, and took part as such councillor in the business transacted at said meeting. The minutes of the said meeting are hereunto attached and form part of this case. Since the said 12th day of February, 1906, the defendant has continued to serve as and discharge the duties of a town councillor for the town of Liverpool and to serve as a school commissioner for the town of Liverpool and as a member of the assessment appeal court for said town, and on the finance and police and license committees of the said town council of the town of Liverpool.

“ 4. The said defendant was a poll tax payer in the town of Liverpool, but was not assessed or rated in the said town of Liverpool on real or personal property or for income.

“ 5. For three years prior to his nomination as such councillor the defendant has rented and resided in a house in the town of Liverpool for which he has paid rent as a yearly tenant. The father of the defendant resided with the defendant in said house and the father was assessed and rated for the said house, but by arrangement with his father the defendant paid the taxes so rated and assessed in respect of the said house. Under the by-laws respecting the water system of the town of Liverpool the defendant was rated for water rates and paid the same. A copy of the said by-laws forms part of this case.

“ 6. The defendant's seat as such councillor has never been declared vacant by said council.”

The Court has already decided, and it is admitted, that under the circumstances the defendant was not a ratepayer. (See *In re Mack*, 1 E. L. R. 222.)

Under the provisions of the statute, R. S. c. 73, he could not become such ratepayer in the ordinary course before the year 1907. The assessment roll must be com-

pleted not later than the 9th of January. Not later than one week afterwards it must be certified and sent to the town clerk: s. 15. And the rate is made at the first meeting of the council after such return for the then current year: s. 76.

There is an exceptional case of persons commencing business in a town after the assessment roll is made up giving notice in writing to the clerk, who is to notify the assessors, who may then assess and return the assessment to the clerk, who may enter it in the book with the proper rate, and such rate may be collected.

But this being an exception the defendant must show that he has brought himself within it. And it is not contended that this happened.

There is a presumption in favour of the continuance of a condition of things once shown to exist. Therefore it appears that the defendant was not a ratepayer at the time of the election and that the disqualification continued until the filing of the information and after the lapse of 21 days after the election, the period allowed for the filing of a petition under the Act to which I am about to refer.

We have a chapter 72, "Of controverted elections for municipalities and towns and of corrupt practices at such elections." It comprises sections from the Controverted Elections Act and the provisions in respect to corrupt practices from the Elections Act, relating, of course, to elections for the House of Assembly, but adapted to elections for municipalities and towns. And, of course, the principal object in view was to prevent corrupt practices at these elections, and to facilitate the contestation of elections, and, in certain cases, the giving of the seat to the right man. The mode of election was the principal subject of enquiry. The petition had to be presented within twenty-one days after the day of the election, a time limit analogous to election petitions of the House of Assembly.

Then followed a provision taken from the Controverted Elections Act devised to transfer from the Assembly to the Court the election petition.

S. 66: "No election or return of a municipal or town councillor or mayor of any incorporated town shall be questioned except in accordance with the provisions of this chapter."

. No doubt this provision had the same end in view as the other, to prevent the council from trying cases of corrupt practices, and there was no such thing, of course, as a quo warranto to question a person's right to sit in the House of Assembly.

However, there it is. There always was a remedy of quo warranto in respect to such an office. If it is taken away it is only taken away by reason of s. 66. Now, it has to be admitted that for disqualifications, and there are many of them, happening after the election, an information in the nature of a quo warranto is the appropriate remedy. That remedy has not been taken away. There could not, of course, be a petition.

And it has been decided that if the disqualification exists after the election it is neither here nor there that it also existed before the election. It is a continuing thing.

There is the decision of our own Court. (Reference to *Reg. v. Kirk*, 24 N. S. R. 170.)

No distinction can be made between a disqualification existing at the time of nomination and at the time of the election. The election includes the nomination. The disqualification sections of c. 71, namely s. 26 and ss. 53, 54, and 55, refer to the election. They control, "serve" or "be elected."

This case is a stronger case than *Reg. v. Kirk*. Here the defendant cannot serve either if he has not been a ratepayer for a year before the election or is not a ratepayer subsequently to the election. He is surely liable in one way or the other. Suppose he was not a British subject, or was but 19 years of age at the time of the election, is he, because he escapes the petition, to be allowed to serve? It is suggested that with a quo warranto you are questioning the election or return contrary to s. 66 of the Controverted Elections Act. That is only questioning it remotely, if at all. It is accidental in some cases that the disqualification exists before as well as after the election. You are no more questioning the election or return by proceedings taken in respect to a continuing disqualification which happened to exist before as well as after the election, than you are doing when it did not exist before.

I do not say that a petition would not lie in respect to this disqualification if it had been brought, and it may

be that during the twenty-one days there are not to be concurrent remedies. But I say that this proceeding is not to question the election or return, but to try what right the defendant has to an office in which the statute says he cannot serve.

The Crown should have judgment, and with costs.

TOWNSHEND, J., concurred.

NOVA SCOTIA.

FULL COURT.

JANUARY 7TH, 1907.

REX v. DOMINION COAL COMPANY.

Master and Servant—Wages—Truck Act—Giving Credit on Current Account—County Court—Appeal from Conviction—Appeal to Supreme Court from Decision Thereon—Conviction—Enforcing against Company—Fine—Statutory Direction for Payment to Person Aggrieved—Repeal of Statute after Offence and before Fine Imposed.

Appeal by defendants from judgment affirming conviction, argued before WEATHERBE, C.J., TOWNSHEND, J., GRAHAM, E.J., and RUSSELL, J., on the 29th November, 1906.

W. H. Covert, for appellants.

J. McK. Cameron, for respondent.

GRAHAM, E.J.:—This is an appeal from a County Court decision affirming a conviction for a penalty under a statutory provision taken from one of the English Truck Acts. It is contained in R. S. (1900) c. 19, s. 27: “(1) The wages or salary of any employee of any coal mine shall not be paid otherwise than in money current in the Dominion of Canada. (2) Any such employee may, by order in writing, authorize his employer to apply the whole or any part of the wages or salary due to such employee to the payment

of any debt due by such employee, but," &c. (effective only for a semi-monthly period.) (3) Any such employer may without any order retain out of the wages . . . any sums due by such employee in respect to powder, coal, oil, rent, checkweighers' fees, doctors' fees or church or society dues." (3a) The owners . . . who contravene or fail to comply . . . shall each be guilty of an offence against this chapter and liable to a penalty of not less than fifty dollars or more than one hundred dollars."

The words which followed, viz.: "to be paid to the person aggrieved," were struck out by an amendment afterwards passed.

S. 57: "No prosecution shall be instituted against any owner . . . for an offence against this chapter except . . . (d) by some person employed in or about the mine in respect to which the offence was committed." The words which followed, viz.: "appointed in writing to institute such prosecution by not less than 12 persons so employed," were struck out by the same amendment.

The informant, Luke Gardiner, a miner, was an employee of the defendant company, and it appears that in March last he had taken goods at the company's stores to the amount of \$8.35, and his father, with whom he lived, had taken goods to the extent of and owed them a balance of \$392.39. By an arrangement which had been running for some time the wages of half of March were credited \$5 on his own account and \$14.07 on his father's account, and part of his wages were paid to him. Accounts were rendered showing these credits. He has prosecuted the defendants for the penalty.

In my opinion there is an appeal to this Court.

The County Courts Act, s. 68, provides that "there shall be an appeal to the County Court . . . in the following cases, that is to say, (a) From all decisions, orders, judgments, and convictions of justices of the peace, stipendiary magistrates, city and municipal courts; . . . (f) from any decision in respect to which an appeal is expressly given by any statute." And in respect to appeals from the County Court to this Court, s. 187 provides that "in all causes whether (a) originating in the County Court or (b) brought into the County Court . . . by way of appeal . . . an appeal shall lie to the Supreme Court . . .

from any judgment, order or decision of a County Court . . . except an order made in the exercise of such discretion as by law belongs to a Judge.”

This last provision is most comprehensive. If the former part of the Act had not included in its enumeration the subject of appeals from justices in convictions and all statutory appeals to County Courts, then it might be contended that the provision giving appeals to the Supreme Court referred merely to appeals from cases coming within the ordinary original jurisdiction of the County Court, or perhaps merely civil cases. But when the Act has already enumerated summary convictions and all kinds of statutory appeals among its subjects of jurisdiction, and then later an appeal is given from the County Court to the Supreme Court “from every judgment, order or decision,” it must be taken to be every judgment, order or decision in the cases before enumerated.

There has been a change in the phraseology of the Act since the decision of this Court holding that there was not an appeal to this Court in appeals from summary convictions.

2. I am of opinion that the defendant company is within the provision respecting the penalty and is liable.

I cannot distinguish this case from the decision of the House of Lords in *Williams v. North Navigation Collieries*, [1906] A. C. 136 (reported after the conviction in this case), reversing the judgment of the Court of Appeal. The only difference is that there part was paid and the part kept back represented a fine. Here the wages were all kept back and an account rendered shewing the credit. I think that no distinction can be made. This statute, like the English one, mentions express exceptions permitting retention by the employer for powder, coal, &c.

3. Following the Ontario decision in *Regina v. Toronto Railway Co.*, 30 Ont. R. 214, I think that a penalty can be enforced against a company under the Summary Convictions Act. In the Coal Mines Regulation Act “owner” means person or body corporate, and there is no provision in that Act for enforcing the penalty. The Summary Convictions Act, by s. 2, is to apply to all cases of penalties where there is no provision in the Act which imposes them for enforcing them. By the general Interpretation Act, c. 1, s.

23 (45), provision is made for the recovery of a penalty or forfeiture with costs by civil action before a court having jurisdiction to the amount of the penalty in cases of simple contract, "if no other mode is prescribed for the recovery thereof and the same cannot be recovered upon summary conviction." It appears to me that a variable penalty like this, i.e., one "not less than \$50 and not more than \$100," is peculiarly a case for the discretion of the magistrates.

The fact that the form of conviction in the Summary Convictions Act has a clause providing imprisonment in default of distress which would be inapplicable to corporations, does not displace the remedy under that Act. I know of nothing which requires a prosecutor to imprison a defendant, if there is not sufficient distress, or to use in a conviction the clause for imprisonment.

It is to be noticed how carefully the legislature has amended the provisions in the Coal Mines Regulation Act. Everything which would appear to give to a person aggrieved a private action for this penalty has been struck out.

4. There is a further point. It appears that the defendants made a deposit as security for costs when they asserted their appeal, and the Judge of the County Court has made a fresh conviction under c. 161, s. 56 (d), providing that the penalty is to be paid out of the money deposited, but he has directed that it should be paid to the informant as the "person aggrieved." The magistrate in his conviction directed that it should be paid and applied according to law. These words in the statute were struck out by an amendment before the information was laid and the law as it stands now does not give the penalty to the person aggrieved.

The learned County Court Judge has held that as this "informant before the repeal of the words complied with the provision s. 57 of the Coal Mines Regulation Act requiring him to obtain the authority of twelve employees to institute his prosecution, he had a "right" which the repeal did not take away.

The provision in the Interpretation Act is this: "The repeal of any enactment shall not affect any existing status or capacity or any right, title, obligation or liability already acquired, accrued or incurred, or any remedy or proceeding in respect thereof."

In my opinion the informant did not by obtaining that authority acquire any right which any other miner could not acquire by getting a like authority from any twelve men: *Abbot v. Minister for Lands*, [1895] A. C. 431.

The question is whether a magistrate in making a conviction and distributing the penalty as he must do (*R. v. Seale*, 8 East 573) to the person aggrieved, if the statute says it goes to him, can do so when that provision was repealed before the information was laid. I think not.

The appeal must be allowed and the case remitted to the County Court to have the order amended in this respect. No costs of the appeal.

RUSSELL, J., concurred.

TOWNSHEND, J., read an opinion allowing the appeal except as to the amendment made by the County Court Judge, which should be struck out, and the fine appropriated as fixed by the justice who tried the case. Otherwise the conviction was affirmed.

WEATHERBE, C.J., declined, on the ground of interest, to express an opinion.

NOVA SCOTIA.

LONGLEY, J.

JANUARY 7TH, 1907.

SMITH v. WAMBOLT.

Husband and Wife—Conveyance of Equity in Real Estate by Husband to Wife—Implied Trust—Subsequent Assignment by Husband for Benefit of Creditors—Sale by Mortgagee—Wife Entitled to Surplus as Against Assignee.

Application for payment out of surplus proceeds of mortgage sale.

R. H. Murray, for assignee for creditors of mortgagor.

A. Whitman, for subsequent incumbrancers.

T. W. Tobin, for wife of mortgagor.

LONGLEY, J.:—The defendant Wambolt in 1894 conveyed to his wife certain real estate by deed which was duly recorded. From my point of view, it does not matter to the legal aspects of the points now under consideration whether this conveyance was a pure gift or whether it was for consideration. The Married Women's Property Act now upon the statute book was not then in force, but the Married Women's Property Act of 1884 was in force, and this matter, it seems to me, must be governed by the law which existed at the time the conveyance was made.

Originally, under the common law a husband could not convey real estate directly to his wife. The theory was that she was feme covert, and no valid transaction could take place between them. The method by which a husband could convey property to his wife was by the agency of trustees. But the English Courts at an early day began to recognize the validity of conveyance of property both real and personal by a husband to his wife (except of course against the rights of existing creditors) upon equitable principles, and when the transfer was clear and free from doubt the husband was assumed to be the trustee for the wife. Afterwards this principle was recognized by legislation, but it can scarcely be said that the Nova Scotia Married Women's Property Act of 1884 covered this point. I think, however, that in the absence of legislation, the law recognized such a transfer as the defendant's deed to his wife, and treated him as the trustee when the conveyance was clear. In this case it was clear. A deed was given and recorded. The affidavit in this case affirms that fifty dollars was paid by the wife as a consideration for the deed, but I think that (apart from creditors) the relations existing between a husband and wife make the conveyance of equal validity if it was a free gift.

At the time the deed was made and recorded, the defendant was perfectly solvent and remained so for more than ten years.

In 1906 the defendant got into financial difficulties and a mortgage on the property was foreclosed and the property sold, and realized a sum larger than the amount due upon the mortgage, and the surplus proceeds were deposited in Court. The assignee of the defendant, to whom the assignment was made, under the Nova Scotia Act, during the

year 1906, applied to me at Chambers for an order directing the surplus proceeds to be paid to him for the benefit of the creditors of the estate. This motion was opposed by the wife, who claims the surplus as the owner of the equitable estate under the deed from the husband.

As I regard the deed as valid, under the authorities, and nowhere are the cases on this point marshalled more fully than in the judgment of Armour, C.J., in *Kent v. Kent*, 20 Ont. R. 445, I would consider the wife entitled to the surplus proceeds, unless special reasons could be urged against it, and I find it necessary to deal with the several points urged on behalf of the assignee.

It is claimed that no authority has ever propounded the doctrine that conveyances made by husband to wife were effective as against creditors. I agree to this, but the point is against what creditors? If at the time defendant had made the deed to the wife he had creditors, it would certainly not be effective to bar their rights. Probably it would not have been effective against an imminent creditor, if there appeared to be reason to believe that the deed was given to defeat an impending liability. But no such condition exists in this case. No present creditor of defendant pretends that his claim extends back to the date of the deed or anywhere near it. The evidence before me makes it clear that the defendant when he gave the deed was perfectly solvent and remained perfectly solvent for ten years and more later. The deed was recorded and therefore every subsequent creditor of the husband had ample notice of the transaction, and could not claim to have been deceived. If, therefore, this conveyance to the wife was legal and recognizable by law when it was made and for years afterwards, I do not think it is reasonable nor in accordance with law, that creditors of 1906 can raise a question of its validity, when their claims arose long after the deed had become legal and effective. The only ground, I think, upon which the assignee can ask for surplus proceeds as against the wife, is on the assumption that the deed is void and worthless in and of itself, and not merely void against creditors.

It was further claimed on the part of the assignee that under s. 3 of the Married Women's Property Act of 1884,

a married woman may enjoy real estate "whether such real estate or personal property shall have belonged to her before or after marriage, or shall have been in any way acquired by her after marriage, *otherwise than from her husband*, free from his debts and obligations contracted after that date." I think the words underscored relate to the last words of the section "free from his debts and obligations," etc., and do not seek to curtail any existing rights which a married woman possessed before the operation of the Act itself.

Again great stress was laid by the counsel for the assignee upon the reading of s. 81: "Nothing herein contained shall authorize any married woman to make a contract with her husband otherwise than in this chapter expressly mentioned." It is claimed that these words are not in the English Act. This deed of defendant to his wife is alleged to be a contract, and one not expressly sanctioned by the Act. This reasoning is very specious, but I must consider the effect of giving it the scope urged. However far it falls short of the full measure of a liberal Married Women's Property Act, the Act of 1884 was designed to extend the rights and powers of married women. The legislature has gone further since, but it was moving in this direction in its first attempt, and following the English Parliament on the lines of placing the rights of married women on a solid, statutable basis, rather than on the ingenious devices of a court of equity. If I should hold that the words quoted above would make the deed of defendant to his wife ineffective, though under the law without the words in this statute it would be perfectly effective, then I should be compelled to say that the effect of the Act of 1884 was not to enlarge the privileges and capacities of married women, but to abridge them. I cannot make myself believe that the words quoted were intended by the legislature to sweep away the rights which equity courts had already established. I feel sure that the words must be given an application consistent with the general scope of the Act, and were not intended to vitiate a conveyance of property which was good under the authority of courts of equity. I conceive the words designed to prevent loose and colourable contracts which would be contrary to equity and good faith, and not to a solemn deed already under the shield of the law. In any case, rightly or wrongly,

I cannot give it the meaning or effect contended for by the counsel for the assignee.

It is also urged on behalf of the assignee that the equitable doctrine of upholding conveyances from husband to wife has been built up in respect of voluntary conveyances, but in this case there appears upon the face of the deed to be a consideration of fifty dollars, and this fact takes this conveyance out of the category of cases established by the equity courts. I am totally unable to appreciate this reasoning. If a pure gift from husband to wife is to be recognized as valid, it seems to be bordering on the absurd to say that it would have any less validity or appeal with lessened force to the discretion of an equity court that the wife had actually paid valuable consideration.

The point was also raised that the Courts had said that "for a man to make himself a trustee there must be an expression of intention to become a trustee." Upon a careful examination of the cases I find this expression used by the highest authorities, but always in cases in which some doubt exists as to whether a clear conveyance has been made to a wife, mostly in cases where shares in companies and other forms of personal property have been sought to be conveyed; but I think all the late authorities go to establish the doctrine that a conveyance by deed under seal to the wife implies on the face of it the trusteeship of the husband.

Michaels v. Michaels, 33 N. S. R. 1, was cited, and this case would be binding upon me. But upon a careful consideration of facts, I am disposed to think that no parallel can be found between this case and that. Nor do I conceive that the words of Townshend, J., p. 11: "She is met with the difficulty that a married woman may not contract with her husband," can be applied or would be sought to be applied to the very different facts of this case. Although the Court was equally divided in Michaels v. Michaels, I find nothing in the opinions of any of the learned Judges which seems to me to bear directly upon the point in dispute in this case.

Upon the argument of this motion, counsel appeared on the part of the Acadia Loan Company, holding a judgment subsequent to the deed to the wife, and also claimed the surplus proceeds for them as subsequent incumbrancers. In my judgment all that has been said against the claim of the assignee applies with equal force to a subsequent incum-

brancer. The deed is either valid or invalid. If valid it is good against subsequent incumbrancers and good against subsequent creditors.

I think the applications of the assignee and of the Acadia Loan Company must both be refused with costs.

NOVA SCOTIA.

RUSSELL, J.

JANUARY 2ND, 1907.

TOWNSHEND v. COLEMAN.

Injunction—Restraining Payment of Money—Dissolving Injunction—Costs—Indemnity.

Motion before RUSSELL, J., to dissolve an interim injunction.

W. E. Roscoe, K.C., in support of motion.

J. J. Power, contra.

RUSSELL, J.:—The action is for money received to the use of the plaintiff, having been paid to defendant as constable to secure release from imprisonment under a warrant of commitment which the plaintiff considers illegal. The contention is that the committing magistrate was not duly appointed a magistrate for a place within which he was acting as such. It is altogether against the learning in reference to injunctions to interfere with that procedure in a case where the only thing at stake is the right to recover a small sum of money, and I can find no rule of the judicature system that seems applicable except the first rule of Order 50, if that rule applies to the case of an implied or, more strictly speaking, quasi contract, such as the plaintiff is proceeding upon in this case. That rule seems to require that there should be a prima facie case of liability on the part of the defendant, while in the present case the prima facies of the matter is the other way, the Court having decided that the warrant of commitment was made by a competent magistrate.

A case of *Poloni v. Gray* was cited, which I have been unable to find in the place indicated. I think it unnecessary to look for it or to await the citation of a case said to have been decided in the North-West Territories, because I am altogether convinced that I should be opening too wide a door if I were to confirm an order which would prevent the due execution of a final judgment of the Supreme Court. The injunction will be dissolved and I see no reason why it should not be with costs. The fact, if it be a fact, that the defendant is indemnified does not appear to me to be a sufficient reason for refusing costs, but I leave this an open question if a serious contention is made, as I have not had an opportunity to consult the practice case cited on the point.

NOVA SCOTIA.

FULL COURT.

DECEMBER 22ND, 1906.

HALIFAX HOTEL COMPANY v. CANADIAN FIRE ENGINE COMPANY.

*Attachment—Absconding Debtor—Company—Service of Writ
“Doing Business within the Province.”*

Appeal by the defendants from the judgment of GRAHAM, E.J., reported ante p. 36, argued before TOWNSHEND, MEAGHER, and RUSSELL, JJ.

W. F. O'Connor, and Jas. Terrell, for appellants.

H. Mellish, K.C., for respondents.

TOWNSHEND, J.:—This is an appeal from the decision of GRAHAM, E.J., refusing to set aside the service of a writ of summons and attachment proceedings against defendant company. Several grounds were taken, the chief of which was that the defendant company, incorporated out of Nova Scotia, never did business within the province by an agent or otherwise. The learned Judge holds that under the evidence the company had an agent within the province by whom it did business, that is to say, Austen Bros., and that at the time of the action that agency had ceased. These

proceedings were commenced under Order 47, s. 6—"when such company has ceased to do business within the province, or has no agent within the province, or an agent cannot be discovered, and such company has property real or personal with the province, the proceedings may be taken against the company as are provided for in the case of absent or absconding debtors in Order 46."

The material questions under this rule are, (1) did the company ever do business within the province; and (2), had the company an agent in the province through whom it carried on business? If not, of course these proceedings were irregular, and cannot be allowed to stand. The vice-president of the defendant company, John Henry McMechan, swears that "the said company had no place of business in the province of Nova Scotia, and has never carried on business within the province save as herein appears. For some time previous to January, 1906, the said defendant company was negotiating through the Messrs. Austen Bros. with the city of Halifax for the sale to the said city of a fire engine, and ultimately, on the 1st of February, 1906, the said company entered into a contract with the city of Halifax to make and supply the said city with a fire engine for the sum of \$7,000." He further swears that G. S. Pritchard, at whose last place of abode the summons was served, being in the city on other business, "it was suggested to him by the said defendant company that he might as well at the same time bear the interests of the company in mind, and do what he could to promote the negotiations which were then pending between the said defendant company and the city of Halifax." He then adds, "that in the event of his bringing to a head the negotiations . . . he should receive a commission in respect of said sale." The only answer is contained in the affidavit of Edward L. McDonald, who swears that "I am informed by the said parties" (Austen Bros. and one of their clerks), "and do verily believe that the defendant company duly appointed and authorized the said firm of Austen Bros. to act as its agents and to carry on its business in the province of Nova Scotia, upwards of a year before the first day of May, 1906, and that the defendants carried on business in the said province of Nova Scotia through and by their agents Messrs. Austen Bros., doing business in the said city of Halifax during the said period."

In reply to this McMechan swears that "the only matter in which Austen Bros. acted in any way as agents of the above named company, was in connection with the sale of the fire engine referred to;" that "Messrs. Austen Bros.' connection with the matter commenced in or about the month of September, 1905, and before that they did no business whatever for the said defendant company."

I think on this evidence no other conclusion can be drawn than that the company's transactions or business in this province were confined to the one sale to the city of Halifax, which they tried to effect through the agency of Austen Bros., or Pritchard, or with the assistance of both, and that they had no office nor place of business within the province. The question then is, do these transactions constitute doing business within the province so as to bring the company under the provisions of the order above cited? If they do, then it must come to this that any foreign company which sells goods in the province through an agent must be held to do business within the province, and its property made liable to attachment under the absconding debtor rules. Such, in my opinion, never could have been the intention of the legislature, nor do I think it to be a proper construction of the rules. They evidently were meant to provide for the case of an individual or company actually carrying on a trade or business in the province, either in person or by agents so engaged, with an office or place of business, but not to cover the case of an agent sent into the province to carry on negotiations for sales of their goods, or even a person residing in the province appointed for the same purpose. In one sense it is doing business in the province, but only in the same way as if they had done the business by letters and correspondence. Here the business was confined to one transaction, and the agent was employed for that alone, and so far as the evidence goes no further or other business was contemplated.

The English Courts under another rule, Order 48, r. 1, have considered and defined what is meant by the words "carrying on business within the jurisdiction," and it seems to me these decisions are directly in point here. In *Singleton v. Roberts*, 70 L. T. 687, it was decided that if the firm had no place of business in the country held in the name of the firm, they do not carry on business within the jurisdiction, even though the partner come to this country regu-

larly and employ an agent here to purchase goods to be sent to the firm abroad. In *Grant v. Anderson*, [1892] 1 Q. B. 108, the Court of Appeal, affirming the decision of the Queen's Bench, held that "the mere employment of an agent in England who collects orders for the firm on commission, but has no power to accept or reject orders, is not carrying on business in England." (Quotation from judgment.)

Now this was in construing Order 48, r. 1, providing for the service of partners where some or all resided out of the jurisdiction, but were carrying on business within the jurisdiction. The question before the Court was therefore in all essentials on this point the same as we have now before us, and the decision sustains the view I have already expressed in interpreting our own order. (Reference to *Salter v. St. Lawrence Lumber Co.*, 28 N. S. R. 335.)

It is unnecessary to discuss the other questions raised on this appeal as in my opinion plaintiff must fail on the point above dealt with. The decision below must be reversed with costs and costs of this appeal, and the writ and attachment with the service be set aside.

MEAGHER and RUSSELL, JJ., concurred.

NOVA SCOTIA.

LONGLEY, J.

JANUARY 2ND, 1907.

ADAMS v. ADAMS.

Trust—Sale of Trust Property without Authority—Purchaser without Notice—Damages.

Action for transfer of land and for damages for breach of trust, tried before LONGLEY, J.

W. B. A. Ritchie, K.C., and T. R. Robertson, for plaintiff.

The Attorney-General of Nova Scotia (Drysdale, K.C.) and H. McInnes, for defendants.

LONGLEY, J.:—In August, 1892, Robert Adams, the plaintiff, being in some difficulty on account of criminal proceedings against him, induced his brother James to lend him \$300 to settle the affair. He also owed him \$85 for the price of a horse and \$15 for the expenses of his brother to Guysboro looking after his interests, making in all \$400. To secure this he gave him a deed of his farm at Elmsdale. The consideration mentioned in the deed was \$500, but I am satisfied that the real consideration was \$400.

At the time of giving the deed Robert Adams obtained from James the following document:

“ Windsor Junction, August 8th, 1892.

“ I, James Adams of Windsor Junction, in the County of Halifax, do hereby agree and declare that I hold the property transferred to me this day by Robert Adams to be re-transferred to the said Robert Adams or his heirs on his paying to me the full amount of money that shall be due to me from him on his asking the re-transfer.”

After this transaction Robert Adams left for the United States and lived in Boston for several years.

The next year James Adams deeded the Robert Adams farm to his brother Jonathan's wife, since deceased, for \$400 consideration. Jonathan has had control of the place ever since, and has agreed to a sale of it for \$1,500 to Jacob Gilby, who is now in occupation.

On the 3rd April, 1901, Robert Adams sent by mail from Boston to James the following communication: “ I hereby notify you that I will take my farm before July, 1901, and if you or any person or persons put any seeds in the ground I will not pay for their expenses.”

Later on, in June, 1901, Robert Adams returned from Boston, and had a formal written notice served upon James Adams, claiming his right to redeem his property, annexing a copy of the declaration of trust, and requiring that James give him a statement of account shewing the amounts due to him for moneys loaned, etc., and demanding a re-transfer of his property, saying that he was ready to pay the amount found to be due.

James Adams did not comply with any part of this demand.

On the 1st March, 1906, Robert Adams went personally to James Adams and tendered him \$400, Canadian currency, accompanying the tender with a demand in writing for a re-conveyance of his property at Elmsdale; also an accounting of the rents and profits since the transfer and an accounting for the dealings of James Adams with certain personal property conveyed to him by Robert on 8th August, 1892.

Then this action was brought claiming a re-transfer of the property, or damages for a breach of the trust, and Jonathan Adams is joined as the heir of his deceased wife.

The defence of James Adams is that in the spring of 1893 he sent a letter to Robert stating that the property was out of repair, fences down, etc., and asking what he should do. To which he alleges he received a letter from Robert, the purport of which was "sell the farm and get your money out of it, as I (Robert) do not intend to return to Nova Scotia." This letter James Adams declares he has lost, but his wife testifies that she saw it, and agrees with her husband's version of the contents.

Robert Adams swears that he never received such a letter from James, and never wrote any such reply, or anything whatever authorizing a sale, and his wife swears that she always received and opened her husband's letters, and either wrote the letters he sent or was cognizant of them, and no such letter was received or sent. In face of this contradiction, I have to hold that James Adams has failed to establish to my satisfaction the existence of any written or other authority from Robert to justify his sale to Mrs. Jonathan Adams.

Under the declaration of trust, I think James Adams was not at liberty to transfer the title of the property without notice to Robert, and that his deed to Mrs. Adams was a breach of his trust.

As to the remedy: The declaration of trust was not recorded by Robert Adams until after the deed was given to Mrs. Adams, and therefore a re-conveyance could not be decreed unless I was satisfied that Mrs. Adams, or her husband, who did all the business and only had the deed in her name for reasons of his own, was aware of the existence of the trust deed when the deed was given. The evidence upon this point left a strong impression upon my mind that Jonathan knew all about the trust. James swears that be-

fore giving the deed he told Jonathan that he had written to Robert and obtained his consent, but did not shew him the letter. James and Jonathan were both active in assisting Robert when he was in trouble, and both probably had common knowledge of the conditions upon which James loaned Robert money. But while I have a moral conviction on this point, in the face of Jonathan's positive statement that he knew nothing of the trust when the deed was taken, I am not clear that the evidence justifies me in making a finding of knowledge on the part of Jonathan. Besides there is some evidence that Jonathan made improvements on the place, and as Gilby has a written agreement of purchase I think it would unduly complicate matters to decree a re-transfer.

It becomes therefore a matter of fixing damages for the breach of trust. As to the value of the place, there is conflict of testimony. Some say it is not worth more than \$500 or \$600. Robert says it cost him \$1,200, and is worth that now. It has a fair sized house, not old, and a small barn on it. Gilby has agreed to pay \$1,500 for it on condition of getting liberal time to pay. James Adams is not entitled to any nice consideration since he has by his action deprived the plaintiff of a right to regain his old home. I fix the damages for the breach at \$250.

Other questions are raised in the case.

The plaintiff on leaving the province in 1892, entrusted to his brother James his furniture, hay, stock and utensils to be disposed of. An auction was held by James and the articles disposed of for \$200, which was sent to Robert. But certain articles are not accounted for in this sale. Some plows, harrows, rakes, a mowing machine, bob-sleds, some hay, a field of oats and potatoes, chairs and an organ. The answer of the defendant James is that the articles, except the hay, were put up for sale with the other goods, but no purchaser offered. It is contended for the plaintiff that James Adams is responsible for these unsold articles and ought to pay a fair value for them. The evidence of value is contradictory and I have no safe basis for fixing it. I should think \$10 would be as much as I have a right to allow from the data furnished. The hay was sold for \$65 and the plaintiff is entitled to recover these amounts in addition to the \$250, making \$325 in all.

The defendant claims that he paid Robert other sums than those included in the original amount of \$400 and should be credited with them. These items are feed, \$15, which I allow; \$25 loaned to Robert on leaving for Boston, which I also allow. \$60 is claimed as loaned to Mrs. R. Adams when she left for Boston. Mrs. Adams says she only received \$30, which I allow. \$100 is claimed for expenses to Guysboro. Robert denies any obligation for this and the amount is not satisfactorily proved. I think under the circumstances I must hold the parties to the sum of \$15 originally agreed upon for expenses when the deed was given, and which forms a part of the \$400 consideration for the deed. James Adams is entitled to be credited with \$70, the aggregate of the sums allowed. This deducted from the \$325 leaves \$255, for which I give judgment for the plaintiff against James Adams.

The action against Jonathan Adams is dismissed, but if I have discretion in the matter, without costs.

As the plaintiff tendered James Adams \$400 before action, and as I find this was more than was then actually due, the plaintiff to have costs against James Adams.

NOVA SCOTIA.

FULL COURT.

JANUARY 8TH, 1907.

IN RE MARITIME COAL AND RAILWAY COMPANY AND ELDERKIN.

*Railway—Expropriation—Award of Damages—Review by
Certiorari—Error in Principle—Allowance of Value of
Improvements made by Company.*

Appeal from the judgment of LONGLEY, J., granting a writ of certiorari to remove an award of damages into the Supreme Court, argued before TOWNSHEND, J., GRAHAM, E.J., MEAGHER, and RUSSELL, JJ., on the 15th November, 1906.

W. B. A. Ritchie, K.C., for the appellants.

H. Mellish, K.C., and J. L. Ralston for the respondents.

The judgment of the Court was delivered by RUSSELL, J.:—A writ of certiorari has been issued to bring up an award made by a majority of the arbitrators appointed to assess the damages payable to Alder P. Elderkin for lands situated at Maccan taken for the purposes of the Maritime Coal and Railway Company. The amount awarded is \$3,500 and the dissenting arbitrator considered that the claimant was only entitled to \$615. The majority of the arbitrators seem to have made up their valuation by capitalizing at five per cent. the rental at which the property had been leased to the company, which was one hundred dollars per annum, and adding the value of a dump which had been placed on the land by the predecessors of the present company. The principal contentions against the award are, first that this award is made up on a wrong principle in that the valuing of the dump involves the fallacy, as it is contended to be, of estimating the damages in view of the serviceableness of the land to the company, instead of having regard to the injury done to the claimant, and, furthermore, in that the company is being made to pay twice for the dump because the dump was part of the property for which the rental of one hundred dollars was paid, and if this rental is capitalized and the value of the dump added it must necessarily involve a double payment for the latter. It is also contended that the arbitrators refused to receive evidence tendered by the company as to the true value of the property, and in view of the excessive amount of the award and the refusal to listen to evidence, it is contended that there has been such misconduct on the part of the arbitrators as will warrant the Court in setting the award aside.

On the part of the claimant it is contended that certiorari will not lie to bring up the award, and the claimant further contends that the award is not excessive and that there was no refusal to hear any evidence properly tendered.

The arbitrators met at Maccan for the purpose of viewing the land and did so. While they were at the York Hotel at Maccan for the purpose of getting their dinner Jephtha Harrison came in, apparently having been sent for on behalf of the company, and was asked a number of questions by George Harrison, the company's arbitrator, as to the value of the land, in response to which he offered some

strong opinions adverse to the interests of the claimant, to which Forrest, the arbitrator appointed on behalf of the claimant, strenuously objected. Neither of the parties was present, nor was either of them represented otherwise than by the arbitrators that had been appointed, and no notice was given of any meeting at the hotel for the purpose of taking evidence or for any other purpose. The intention was to meet at Amherst, where the parties would be heard by their counsel, and the arbitrators did accordingly meet at Amherst, where a hearing took place, counsel for both parties being heard at length. Mr. Archibald, the third arbitrator, says that no decision was made at Maccan, that evidence would not be heard. If there had been a decision made by the arbitrators that they would not hear at that time and place the statement then being made by Jephtha Harrison, I think it would have been a very proper decision under all the circumstances. If they had heard his evidence then and there in the absence of the claimant, and without notice to him, it would have been misconduct such as, I think, would have invalidated the award. No tender of evidence was made by either of the parties at the hearing at Amherst, and if, after the parties had retired, the majority of the arbitrators decided that there was no necessity for further hearing or inquiry, I think they had a right so to decide and that there was no misconduct in their proceeding to make their award.

It seems to me probable that the dump, so called, has been valued twice, but this has not been clearly made out. There was a dump or road bed placed on the land by the predecessors of the present company, but Harrison swears that this was re-ballasted and, with the exception of two places where the position of the dump had been changed to straighten the railway, it was used as the foundation of the present road. His affidavit shows that the rental was based on the value of the dump as it was left by the former company, and Elderkin's affidavit is to the effect that the property in its improved condition reverted to him from the failure of the present company to pay the rent. We have no material on which to estimate the value of the improvements. If they amounted to a thousand dollars and became the property of the claimant, I suppose it would not be error to include this sum in the award, however unjust it may seem that the company should be obliged to pay for

what it had itself created. But these are questions with which this Court cannot deal, and could not deal even assuming that certiorari would lie to remove the proceedings. They are within the jurisdiction of the arbitrators. The award is good on its face and the decision arrived at by the arbitrators is therefore final. In this view it becomes unnecessary to consider whether the proceedings can be brought up by certiorari.

NOVA SCOTIA.

LONGLEY, J.

JANUARY 9TH, 1907.

LOWNDS v. CLAY.

Bills of Exchange and Promissory Notes—Accommodation Maker—Subsequent Endorser with Notice Paying Holder—Summary Judgment.

Application for order for judgment under O. 14.

J. B. Lyons, for plaintiff.

W. F. O'Connor, for defendant.

LONGLEY, J.:—This is an application for judgment under O. 14. The statement of claim is against the defendant as maker of a promissory note for \$44.78 payable three months after date at the Royal Bank, which was duly presented for payment and dishonoured.

The affidavits reveal the fact that this note was made by the defendant to one Charles M. Lownds, who indorsed the note and induced the plaintiff also to indorse it. The bank then discounted it, and the defendant having failed to pay, the bank called on plaintiff, who paid the note and now brings action against the defendant.

The only defence urged is stated in the affidavit of defendant, who says that the note was signed for the accommodation of C. M. Lownds, and in the affidavit of C. M. Lownds, who says that plaintiff was aware when he indorsed the note that it was for the accommodation of C. M. Lownds.

The defendant's counsel urged that as the note was over-due when plaintiff became the holder the defendant has the right to raise any defence he might have raised against the original payee.

In my judgment this constitutes no defence against the plaintiff. As I understand the law (Maclaren p. 174), an accommodation party is liable on a bill for a holder for value even if the holder knew the bill was accommodation: *Breeze v. Baldwin*, 5 O. S. 444.

The plaintiff paid under his obligation to the bank the full amount of the note, and is, I think, entitled to recover against defendant as maker. I see no defence possible herein under the facts, and I think plaintiff should have judgment.

NOVA SCOTIA.

LONGLEY, J.

JANUARY 9TH, 1907.

MCNEIL v. O'CONNOR.

Mortgage—Foreclosure—Sale of Property—Action for Balance of Mortgage Claim—Costs.

Trial of action before LONGLEY, J.

H. A. Lovett, and Jas. Terrell, for plaintiff.

H. Mellish, K.C., for defendant.

LONGLEY, J.:—Plaintiff had a mortgage upon certain premises of defendant and some time ago took the usual proceedings for a foreclosure and sale, which was had, and the property did not realize sufficient to pay the principal interest and costs.

Later the plaintiff brought an action against the defendant to recover this balance upon the covenants of the mortgage deed.

Several defences have been set up and must be dealt with. It is argued that plaintiff having exercised her power of foreclosure and sale cannot now sue on the covenants.

The defendant cited Poulett v. Hill, [1893] 1 Ch. 277, and Williams v. Hunt, [1905] 1 K. B. 512, in support of this proposition. A careful review of these cases satisfies me that they are not applicable to the present case. In these cases an action had been taken in the Chancery Division by a mortgagee for principal and interest due, claiming also foreclosure, and while that action was pending another was brought in the King's Bench Division to recover principal and interest. The Court held that the first action was sufficient to obtain every remedy, and, therefore, that the second action was needless and vexatious.

Reference was also made to Thomson v. Pitts, 26 N. S. R. 108, in which it was decided that when an order for foreclosure contained a clause giving the plaintiff leave to move for judgment for the balance remaining due after foreclosure and sale of lands covered by the mortgage, the plaintiff was entitled to an order to enter judgment for the balance. This decision, it seems to me, does not cover the present case. The plaintiff's first action was for foreclosure and sale only, and no claim was made on the covenant, nor did the order for foreclosure contain any such right to enter judgment for the balance.

The leading authority in this province is Kenny v. Chisholm, 19 N. S. R. 497, and this is binding on me. But it was urged that since that decision the Judicature Act has been amended and under O. 51, R. 10, sub.-s. 2, it is enacted that "if the purchase money is insufficient to pay what is found to be due to the plaintiff for principal and interest and costs, the plaintiff shall be entitled (when the mortgagor is defendant and such relief has been claimed) to an order for the payment of the deficiency."

It is clear that a mortgagee may obtain all relief in respect of his mortgage debt by one action and may include a claim on the covenant when seeking foreclosure. If the mortgagee does not take this course, it may be that he should not be allowed costs in the second action; but I do not find any authority, or any sound reason, for the proposition that when a foreclosure suit has been brought and no claim for deficiency in the covenant included, the mortgagee is to be debarred from seeking the deficiency by an action on the covenants. Serrao v. Noel, 15 Q. B. D.

549, was cited in support of this view, but after a careful study of it I do not think it goes quite this far. In that case proceedings had been taken against the defendant in respect of certain mining shares, and as a result of that suit an order was obtained by consent, vesting in the plaintiff the shares in question, which were in the actual custody of the company. The shares were not actually returned to plaintiff for two months, during which period the shares declining in value plaintiff brought another action against defendant for loss by depreciation. The Court decided that he could not do this for he was bound by the judgment he had taken by consent, and after the passing of this order the delay in returning the shares was not due to the defendant but to the Company. Giving the fullest effect to the words of Bowen, L.J., in that case (quoting them) I do not think they apply to the case now before me. Although plaintiff could, and perhaps ought to, have included a claim for deficiency in his foreclosure suit, yet he did not, and this action is, it seems to me, based upon a claim entirely separate from the foreclosure suit, and is not a matter which can be regarded as *res adjudicata*.

The defendant raised three other points on this branch of the case, but I regard them as being substantially embraced in the first, and I have dealt with them all.

One other point was raised by the evidence. The defendant says that when in the former suits an order was sought before the learned Chief Justice to confirm the sheriff's report, he, before the order was moved, asked Mr. Terrell, the plaintiff's solicitor, if he was seeking an order or making a claim for deficiency, to which Mr. Terrell replied, "No." Mr. Terrell confirms this in his evidence, but states that his answer was, "Not in this suit." Immediately after the confirming order was passed the plaintiff's solicitor demanded from the defendant the payment of the deficiency. Admissions were filed signed by plaintiff's solicitor and defendant as to what occurred.

I have read these and the evidence carefully to see if I could find anything to support the contention that plaintiff's solicitor had obtained his order confirming the sheriff's report upon an undertaking not to make a claim for a deficiency. I am not quite satisfied upon this point,

but if the matter should go farther I shall abstain from making any finding. There was nothing in the demeanour of the witnesses which would form any element in determining any issues of fact. .

All I decide is that I am not satisfied that plaintiff's solicitor intended to abandon his claim for a deficiency in his conversation with defendant, although it is quite possible that defendant so understood him. In view of the facts and upon the authority of *Kenny v. Chisholm*, I give judgment for the plaintiff for the amount of her claim, \$876.45. But as I think plaintiff might, and should, under the Judicature Act have embodied this claim in her former action, she should have no costs in this action.

NOVA SCOTIA.

FULL COURT.

JANUARY 10TH, 1907.

COX v. McLEAN.

Amendment—Costs—Counterclaim.

Action for the return of a horse and for damages for its wrongful and unlawful seizure, detention and conversion, tried before McKENZIE, Co.J., who gave judgment for plaintiff for \$90, \$70 value of the horse, and \$20, damages for detention, with costs. Defendant was given the costs of an issue for wrongful dismissal and was also allowed to amend his pleadings by counterclaiming for \$37 paid by him on plaintiff's account and judgment was given in his favour for this amount with \$3 costs, the one amount being set off against the other and judgment being given in plaintiff's favour for the balance.

An appeal by the plaintiff from the order allowing defendant to amend was argued on the 8th January, 1907, before TOWNSHEND, J., GRAHAM, E.J., RUSSELL, and LONGLEY, JJ.

T. R. Robertson, for the appellant.

No one contra.

The judgment of the Court was delivered by RUSSELL, J.—The appeal should be allowed with costs. The plaintiff should not have been made to pay the costs of an amendment required by the defendant, and the defendant should not have been allowed costs on a counterclaim which was put on the record to enable him to get the benefit of payments which he did not put forward as a claim against the plaintiff, but as payments on account of the horse of which he was claiming to be the owner. There is no appeal from the judgment in favour of the plaintiff, and although there is no proof to warrant the award of twenty dollars damages for detention, we think that the judgment for the plaintiff cannot be disturbed.

NEW BRUNSWICK.

FULL COURT.

JUNE 6TH, 1906.

EX PARTE DEMMINGS—IN RE VICTORIA COUNTY LICENSE COMMISSIONERS.

*Intoxicating Liquors—Application for License—No Report
by Inspector—Prohibition.*

On the application of one Demmings, an order nisi for a writ of prohibition was granted by Barker, J., to prohibit the license commissioners and the inspector of licenses of Victoria county from issuing a tavern license to Hugh D. Johnston, on the following grounds:

(1) That there was no written petition from Johnston to the commissioners praying that a license may issue;

(2) That there was no report in writing to the commissioners that the applicant is a fit and proper person to have a license;

(3) That there was no report that the premises sought to be licensed had all the accommodation required by law, and that the applicant was known to the inspector to be of good character and repute.

On the return of the order nisi the matter was argued before TUCK, C.J., HANINGTON, LANDRY, MCLEOD, and GREGORY, JJ.

Thos. Lawson showed cause against the order nisi.

T. J. Carter supported it.

A number of affidavits were read to the Court and showed in substance that a petition in writing praying that a license issue to Hugh D. Johnston, signed "Hugh D. Johnston per T. L." had been lodged with the inspector at Johnston's request; that the report of the inspector stated that the premises sought to be licensed did not have the accommodation required by law, and that no license should be granted therefor, and was silent as to Johnston being a fit and proper person to have a license or that he was known to the inspector to be of good character and repute; that at the meeting of the commissioners to consider applications for licenses Johnston had been sworn and had given evidence as to the accommodation in the premises sought to be licensed; and that the application of Johnston had been considered and a certificate for a license granted.

Lawson, in showing cause, contended that the order nisi should be discharged on the ground that two of the affidavits used before Mr. Justice Barker on the application for the order nisi were sworn before one of the partners of the firm of attorneys for the applicant: *Batt v. Vaisey*, 1 Price 116; *Hopkinson v. Buckley*, 8 Taunt, 74; *In re Gray*, 21 L. J. Q. B. 380; *Reg. v. Marsh*, 25 N. B. R. 370. He argued as to the merits that the commissioners having granted the certificate were functi officio and that prohibition being a preventive and not a corrective remedy should not be granted: *High's Extraordinary Legal Remedies*, sec. 767; 23 Am. & Eng. Enc. (2nd ed.) 204; that there was another adequate remedy by certiorari to quash the certificate; that the writ should not issue against such a body as the commissioners: *Poulin v. Corporation of Quebec*, 9 S. C. R. 194; *Lord Camden v. Home*, 4 T. R. 382; that the jurisdiction of the commissioners did not depend on the report of the inspector, and that if the prescribed conditions did exist the certificate could be granted.

Carter, in support of the order nisi. The objection as to the affidavits does not apply as there was no attorney on the record; but even if the affidavits objected to are not read, there is sufficient material not objected to on which to base the application. As to the objections to the writ issuing he referred to the unreported case of *Ex parte Lovely*; *In re Victoria County License Commissioners*, decided in Trinity Term, 1900. In that case the commissioners had granted the certificate for a license, and an order nisi for a writ of prohibition was granted at Chambers. On the return of the order nisi, the Court (TUCK, C.J., HANINGTON, LANDRY, and MCLEOD, JJ.), after consideration, granted a rule absolute for a writ of prohibition. S. 11 of the Liquor License Act (c. 22, C. S. 1903), requires that certain reports shall be made, and unless this is done, the commissioners have no jurisdiction to deal with an application for a license. It is only where the inspector has made the required report and objections are filed to it that they have the right to hear evidence.

TUCK, C.J.:—I have no doubt about this case. The commissioners had no jurisdiction to issue the certificate for a license and the order for a writ of prohibition must be made absolute.

HANINGTON, J.:—I agree. The commissioners had no jurisdiction to grant a certificate for a license until the report of the inspector as required by s. 11, as to the applicant being a fit and proper person to have a license, and the other requirements of the Act, were complied with. Such being the case the writ of prohibition is the proper remedy, and I think the Court is not debarred from issuing the writ because the certificate has been issued; something further has to be done and the Court should prevent that. If this application depended on the affidavits sworn to before Mr. Carter's partner, I think the order would have to be discharged, for under the authorities affidavits so sworn cannot be read; but the other affidavit used before my brother Barker contains all the facts necessary to support the application.

GREGORY, J.:—I feel clear that the commissioners had no jurisdiction under the terms of the Act to grant the

certificate for a license. I had some doubt as to prohibition being the proper remedy, but on the authority of the case of *Ex parte Lovely*, I agree that the writ should go.

LANDRY, and McLEOD, JJ., concurred.

NEW BRUNSWICK.

FULL COURT.

JUNE 15TH, 1906.

LUNT v. KENNEDY.

Fredericton City Court—Application to Review Judgment—Time for Applying—Delay in obtaining Copy of Proceedings—Affidavit Sworn to before Notary out of Province—Entitling Affidavits.

Application by the defendant to GREGORY, J., at Chambers, for the review, under C. S. 1903, c. 122, s. 6, of a judgment by the police magistrate in the city of Fredericton civil court in favour of the plaintiff.

On the return of the order for hearing the following preliminary objections were taken:

(1) That the affidavit of the defendant taken out of the province before a notary public could not be read;

(2) That the affidavits were improperly entitled in the City of Fredericton civil court;

(3) That there was no jurisdiction to hear the application because it was not made within thirty days after judgment; or within thirty days after obtaining a copy and minute of the judgment and proceedings under an order of a judge enforcing obedience to an application for the same.

GREGORY, J., referred the application to the Court, and it was argued, in Easter Term, 1906, before TUCK, C.J.,

LANDRY, HANINGTON, BARKER, MCLEOD, and GREGORY, JJ.

A. R. Slipp, for the application.

J. D. Phinney, K.C., contra.

The first objection was overruled on the argument, and is also dealt with in the judgment of Tuck, C.J. The second objection was also overruled, the Court holding that affidavits on review should not be entitled in any Court and that if so entitled the entitling might be treated as surplusage.

TUCK, C.J.:—This cause was tried at the City of Fredericton, in the County of York, on the 15th, 16th, and 25th of November, and the 5th of December, 1905, before the police magistrate, who gave judgment for the plaintiff for \$20.50, and costs of suit, \$17.30.

By the affidavit of Arthur R. Slipp, who appeared as counsel, on behalf of the defendant, it appeared he applied within six days after judgment to the police magistrate for a copy of the evidence, and paid him two dollars at the time of such application; that thereafter and until the 21st of February, 1906, he enquired repeatedly of the police magistrate as to the time when the copy of the proceedings would be ready and was advised on each occasion that they would be ready soon, and that the delay was due to much other similar work being on hand; that he (Slipp) would be advised as soon as they were ready, and that on the morning of the 21st of February he was informed that the papers were ready, and on the same day called therefor, and received them. There is also the affidavit of the defendant as regards the above much to the same effect as Mr. Slipp's affidavit, founded on information received from the latter, and adding the usual words, that substantial justice was not done him on the trial, and desiring that the proceedings be taken up on review.

Application was then made to Mr. Justice Gregory for an order to review, who without hearing the case on the merits referred it to this Court for their opinion, principally on the point that the application to him was not made until more than thirty days after judgment had been

delivered by the police magistrate, and therefore he had no jurisdiction to hear the review.

First, however, in regard to another point taken before Mr. Justice Gregory, that the affidavit of the defendant having been taken out of the province before a notary public, cannot be read in proceedings on review. Kennedy's affidavit was sworn to in the State of Iowa, one of the United States of America. The jurat to this affidavit is in the words and figures following:

"Sworn to at the town of Preston, in the county of Jackson in the State of Iowa, one of the United States of America, this 28th day of February, A.D. 1906, before me G. E. Bartholomew, a notary public in and for the State of Iowa." Then there follows the notary's certificate in these words: —"In testimony whereof I, the said notary public, have hereunto set my hand and affixed my official seal at the said town of Preston, in the county of Jackson and State of Iowa, the 28th day of February, A.D. 1906. G. E. Bartholomew, notary public in and for the State of Iowa," and his official seal was affixed.

Objection is taken in the first instance that an affidavit taken out of this province before a notary public cannot be used in proceedings on review. Several citations were made to support this contention: *Regina v. McIntosh*, 12 N. B. R. 375; C. S. 1877 c. 55, ss. 2 and 3; *Waterbury v. Nixon*, 18 N. B. R. 373; and *Ex parte McQuarrie*, 24 N. B. R. 287. Upon examination of these citations, I think they do not support the contention. The cases cited do not touch this point at all.

C. S. 1903 c. 62, "An Act respecting commissioners for taking affidavits out of the Province," is sufficient authority for taking this affidavit. And s. 5 of that chapter makes provision for any informality in the entitling or heading or other formal requisites of any affidavit, declaration, etc., made, taken, or sworn to out of the province under the authority of c. 62. In my opinion, the affidavit of the defendant for review is properly sworn to, and may be used on the application for review.

As to the principal point I have never had any doubt, although it has never to my knowledge come up for formal decision before the full Court. When at the bar, and since

being on the Bench, I have never heard the right questioned, that an applicant for review might apply at any time, within thirty days after he got from the magistrate a copy of the proceedings. I have always acted upon that view, and have not known that any Judge has acted upon a contrary one. That is the general principle and I propose to act upon it, unless this Court decides otherwise.

But this case is particularly strong. Within six days after the police magistrate had delivered his judgment, Mr. Slipp, acting for the defendant, asked the magistrate for a copy of the proceedings, and kept asking for it down to the 21st of February, when he received it. Why, to shut him out of review under such circumstances would be an absolute denial of justice!

I do not base my judgment upon the facts of this case; but I say that a party is in his right, when he applies for review within thirty days after he receives a copy of the proceedings, unless indeed a failure to receive such copy within the time limited is his own default.

My advice to the learned Judge is to hear the case on review.

LANDRY, J.:—The only point left for the decision of the Court as to its advice to Mr. Justice Gregory in this case is:—Has the defendant in point of time complied with the requirements of C. S. 1903 c. 122, s. 6?

The prevailing practice for many years, in matters of review, has been to treat the applicant as having complied with that section in point of time, when he has applied to the justice for a copy of the proceedings within six days after judgment, and when he has placed the same before the review judge within thirty days after receiving such copy. I know of no decision to the effect that it is necessary that such application to the review judge should be within thirty days after signing judgment. It has been my practice as review judge, when the application was made to me after a lapse of thirty days after the date of the judgment, to require an explanation as to the cause of the delay; but in no case have I refused a summons on the ground that more than thirty days has expired since

judgment, if the application was made to me within thirty days after obtaining the returns, and I believe that has been the general practice. The Court is by this reference required now to say if that is the true interpretation of the section. A careful reading of s. 6 will shew that its meaning is ambiguous; that under it grounds for several interpretations seem quite, if not equally, strong.

There is no dispute here as to the correctness of the time of the application made to the police magistrate for the returns, but it is contended that the application to the review judge was too late, inasmuch as it was more than thirty days after judgment was obtained. Judgment was obtained on the 5th of December; the application to the review judge was on the 19th of March, hence more than thirty days elapsed after obtaining judgment. The answer to that is that the returns were obtained on the 21st of February only, being less than thirty days before the 19th of March, the date of the application to the review judge, hence in time. In the affidavits used it is made clear that the delay was not the fault of the party seeking the review unless he loses his right to review if he neglects to enforce obedience by a judge's order if the trial justice fails to deliver the returns within three days after demand upon him to do so.

If all the words in s. 6 have to be given a distinct effect and are intended to have statutory control, then I would say that the applicant must proceed to enforce obedience to his application for the returns, if the trial justice fails to deliver them within three days, or lose his right of review. Such an interpretation would make imperative the decision that an application for a review order must be made within thirty days after judgment in case the returns are obtained within three days; and in case obedience has been enforced by a judge's order, the application to the review judge must be made within thirty days after so obtaining the returns. I can see no escape from such a decision if due regard is had for the language that precedes, and if full effect is to be given to the words in the section, "within thirty days after such judgment," and, "or after obtaining the copy and minutes aforesaid." These two sets of words cannot apply to the same conditions. One must apply to returns given within three days after demand, and

the other must apply to returns obtained on enforcing obedience.

Another ambiguity is shown by trying to answer these questions: Is the review judge required to appoint a time whose date will be thirty days after, etc.? and, Is he required within thirty days after, etc., to appoint a time whose date is in his discretion and indefinite? That is, Is the review judge's act of appointing a time to be exercised within thirty days, etc.? or, Is the time appointed to be within thirty days, etc.? The language of the section leaves much to be said in favour of either view.

Having regard to a practice that seems quite uniformly established, and believing that such practice works no injustice and meets quite fairly, if not fully, the intention of that section, I would be loth to give it a meaning, though the language might permit it, that will disturb that practice in review matters. My opinion is, therefore, that the presenting of the returns to the review judge being within thirty days after they were obtained by the applicant, the delay not being his, he is not debarred from his right of review because of the lapse of time between the judgment and his application for review.

HANINGTON, J.:—For the first time in my experience I have heard the proposition stated that a review could not be had if it was beyond the thirty days from judgment, although within thirty days after the party had received a copy of the proceedings from the justice. Both as a student and while practising I have considered that in cases of review the statute gives thirty days from judgment, or thirty days after receiving the papers. It is perfectly clear that there are two periods fixed by distinct and imperative words of statute, and one is that the party if he apply within thirty days after receiving the copy the judge may entertain the matter in review. I cannot see how such a construction can be put upon it as would prevent the party applying within the thirty days after receiving the copy. The words of the statute say so; the practice says so; and I cannot see how any injustice is done by such practice.

I might say if it could be shown to the judge that the party seeking the review had by acts amounting to fraud

avoided getting the proceedings, that would be another thing; but I have never known such a case, and do not think it would substantially arise. No injustice can be wrought by the reviewing party not being diligent, because the party with the judgment in the Court below can before an order for review is served go to the justice and have an execution upon his judgment and therefore is secured, and the burden is upon the party wanting the review to get an order and such proceedings with reference to the order to be issued within thirty days from judgment, or thirty days after receiving the copy of proceedings.

I think it perfectly clear that the judge should follow the statute and issue an order and he has jurisdiction to issue it if laid before him within thirty days after the copy of the proceedings is received by the applicant from the magistrate.

GREGORY, J.—This is a matter of review brought before me and referred by me to the Court, there being a diversity of opinion and practice in matters of review in the profession generally, and I think also among the judges.

The point related to the time within which a review could be entertained by a Judge of the Supreme Court or of the County Court, under C. S. 1903, c. 122, s. 6.

In this case the judgment was for the plaintiff before the magistrate and was delivered on the 5th of December last. The return was received from the justice on the 21st of February, 1906, which was more than thirty days after the judgment. I required the party coming to me for review (as I have always done since I have been on the Bench, and as has been my experience as a student and practitioner to have been often done by other judges, my predecessors on the Bench), to account for his exceeding the time of thirty days from the judgment before the magistrate, in some way that would show that the delay was not his fault and that he had been duly diligent but had been delayed by the magistrate in delivering the copy of the proceedings. There was produced to me an affidavit of Mr. Slipp, attorney for the reviewing party, that after demanding a copy of the proceedings within six days and from thence until the 21st of February, when they were

delivered, he repeatedly inquired of the police magistrate when the copy would be ready and was told it would be ready soon and that the delay was due to much other and similar work being on hand by the magistrate, and he was also informed that when the proceedings would be ready, which would be shortly, he would be notified. On the morning of the 21st of February he was informed by the magistrate that the copy was ready and on that day he called and received the copy of proceedings. The order for hearing was made on the 19th of March. That was within thirty days of the receipt of the copy of the proceedings.

It is in my opinion exceedingly important that the parties who have their causes tried before the magistrate should be kept within the statutory limits for review, and while it is true that the section I have referred to, s. 6 of c. 122, says that a judge may within thirty days after judgment delivered, or after obtaining the copy of the proceedings, make an order for hearing the review, yet taking those words without any other consideration they would upon their face appear to be a warrant for a judge granting the hearing for review, regardless of any delay that had occurred in delivering the copy of proceedings. I do not think that the delay should be overlooked unless it is accounted for and clearly shewn that it is no fault of the reviewing party.

The section goes on to provide if the magistrate does not furnish the copy within three days from the demand he may be ordered by a judge to furnish it and may be punished if he does not do so; and one view that is put forward is that the latter words of the section to which I have referred, "within thirty days after the receipt of the copy," means and means only when that copy is received upon a judge's order, and that the reviewing party if he fails to get it within the time limit first of all given him to demand, six days after judgment, and the three days given to the magistrate to supply it, that if the magistrate does not deliver it within that time, the reviewing party must go to a judge and get an order from him to compel him; that then the thirty days count only from a receipt under such an order. And it has been urged that the reviewing party must resort to that course if he does not get his proceedings within the time, and that would appear

to be a construction that might fairly be placed upon the words used; but it does not appear to me to be necessary either in such a case as this or any other case of administering the law to so construe it as to require a party to apply for an order from a judge to force a man to do that which he was anxious and ready and willing to do. It would only be adding expense, and if, as in this case, the magistrate said in answer to the demand from him: "I will make and deliver the proceedings to you as soon as the work on hand will permit," it would seem to me that willingness and expression of the magistrate that he would deliver the required copy as soon as he could, ought to, in this matter, as in any other, avoid the necessity of getting from a judge an order requiring him to do that which he was willing to do.

If I be right in that I do not think that there is any other reasonable view to take of the section but this, that if the magistrate is willing to give the proceedings you need not go to a judge for the order, but you can keep at the magistrate until he, at the first opportunity he has, delivers them to you. You then get them at as early a time as possible, and if the party applying satisfies the judge that he has so done he has excused himself from any laches by which he would lose his appeal or review, and is entitled to his order. I would take a different view if he did not account for the delay and clear his own skirts of a charge of negligence. To take any other view and simply not look behind the date he receives the proceedings, I think would be putting in the hands of one litigant a means of practising gross wrong upon the other with whom he is in litigation, and opening the way to fraud and misrepresentation and deceit, and prolonging his right of review beyond what the legislature intended to give him.

There were other points raised about the affidavits, regarding before whom they were sworn; and also as to the entitling of the affidavits. The Court expressed their view on these points on the argument and are of opinion that they are immaterial, and that there is nothing in them.

The view of the Court is that I should proceed to hear the review on the merits.

MCLEOD, J.:—I agree with Mr. Justice Gregory. As to the practice, I think the delay, if there is a delay, should be accounted for as stated by him.

BARKER, J., took no part.

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PRINCE EDWARD ISLAND.

FITZGERALD, V.C.

MARCH, 1906.

IN RE MCINTYRE.

Dower—Bar of Dower in Mortgage—Surplus after Mortgage Sale—Dower Claimed in Whole Amount Realized—Judgment against Mortgagor before passing of Dower Act—Priorities.

Application under 63 V. c. 2, for payment of judgment out of surplus moneys paid into Court by mortgagee after sale of mortgaged lands.

A. A. McLean, K.C., for the applicant.

G. Gaudet, for the mortgagor's widow.

FITZGERALD, V.C.:—The facts in this case shortly are, that previous to the Dower Act of this Province passed in 1899 (originally ss. 2 and 3 of the Imperial Act, 3 & 4 Wm. IV. c. 105), one McIntyre and his wife executed a mortgage on certain lands, she joining to release her dower. Afterwards, and also previous to the passing of the Dower Act, Dogherty obtained a judgment in the Supreme Court against McIntyre, on which there is now due for principal and interest \$79.20. On the 18th June last, McIntyre died leaving a widow and children him surviving, and subsequently the lands were sold under the power of sale in the mortgage, realizing \$1,905. The mortgagee has paid into Court the sum of \$200.60, the balance over and above the amount secured by the mortgage.

On this application, McIntyre's widow claims the whole balance in payment of her dower interest computed on the value of the lands at the amount they sold for and not on the balance after deducting mortgage debt.

The husband here dies beneficially entitled to an equity of redemption of a mortgage in which the wife has barred her dower, an admittedly equitable estate of inheritance within s. 2 of our Dower Act; and that section 'eo presenti' says, that in such a case the widow shall be entitled "in equity to dower out of the same lands."

This language may fairly be taken as intended to apply, as between husband and wife, to a state of facts coming into existence after the Act. That which the widow had not before, viz., a right of dower in her husband's equitable estate, is now given to her, when the husband dies entitled thereto. In this case, since the passing of the Act, the husband has died so entitled and presumably she would be entitled to the remedial benefit under it.

Whether she was married before the passing of the Act, or had joined in barring her dower previously, does not affect her present status as a widow surviving a husband dying entitled to an equitable estate of inheritance.

It appears to me that the Legislature intended no qualification of the dower interest so given the widow, or limitation to those married after the Act, or to those who had barred their dower, after its passing.

There is in the Imperial Act an express limitation of its effect, with none here. I cannot restrict the general language of the Act, so that it shall not apply to all who come within its terms, all widows whose husbands die entitled to an equitable estate.

When, however, you come to deal with other persons interested, and whose rights are or may be affected, no retrospective construction can be given to an enactment which does not put it beyond doubt that the Legislature intended to deal with such rights.

Dogherty's judgment bound, as a lien or charge, the husband's equity of redemption, before the Act gave the wife any dower in it, with the right under such judgment to sell such equity of redemption absolutely freed from all dower interest.

It is clear law that all existing rights must be interpreted with reference to the law as it stood at the time of their existence, and that no general change in the law will be held to alter or affect them. There must be specific legislation clearly retroactive, showing an intended interference, before such rights are deemed to be affected.

It is obvious that this Act did not intend to interfere with any estates, charges or encumbrances which the husband might have lawfully created on the lands in which this equity of redemption existed, previous to the passing of this Act, when no right of dower was in esse, and when he had full power to convey, charge or encumber. The Act is absolutely silent in relation thereto.

This judgment then stands paramount to any claim of dower on the part of McIntyre's widow, a lien and charge upon this equity of redemption before it became an estate in which she possessed any right of dower.

It must consequently be first satisfied and discharged.

There only remains the question, how is the amount of this dower to be estimated, on the whole value of the land or on the surplus over the encumbrance?

In Ontario, the Legislature adopted and enacted the rule upheld in *Robertson v. Robertson*, 25 Grant 486, and in that Province since 42 V. c. 22, the widow's dower is estimated upon the whole value of the land.

In this Province, the Master of the Rolls in *Sobie v. Gamble*, followed *Robertson v. Robertson* upon the principle (as I understand it) that the wife in joining to bar her dower to better secure her husband's debt, became a surety for him. She pledged that which was hers to secure his debt, and consequently, the relation of suretyship was upon the execution of the mortgage, constituted between the wife and the husband, and subsisted at the death of the latter; and that therefore, when the debt is liquidated, either out of the general estate of the husband, or by sale of the mortgaged property itself, the husband and wife are relegated to their former position with an estate clear for the dowress. That to give the widow dower out of the surplus would in effect make her pay a portion of the debt out of her property, which could not be done, as it is the husband's debt, and his, not her interest in the land, should satisfy it.

I concur in that judgment.

The order will be that the sum due to Dogherty under his judgment, viz., \$79.20, be paid to him with his costs of this application, and that the balance be paid to the widow, as, calculating the value of her dower at her age, 51, on \$1,905 (the value of the farm), its cash equivalent exceeds the balance on hand.

See the following cases: Robertson v. Robertson, 25 Grant 486; Dawson v. Bank of Whitehaven, 4 Ch. D. 639, 6 Ch. D. 218; Meek v. Chamberlain, 8 Q. B. D. 31; Martindale v. Clarkson, 6 Ont. App. R. 1; Fitzgerald v. Fitzgerald, 5 Ont. L. R. 279; Anderson v. Elgie, 6 Ont. L. R. 147; Re Williams, 7 Ont. L. R. 156.

PRINCE EDWARD ISLAND.

FITZGERALD, J.

FEBRUARY 6TH, 1906.

PALMER v. REILLY.

Bills of Exchange—Action on Lost Note—Striking out Plea of Loss—Indemnity—Costs.

W. S. Stewart, K.C., for plaintiff.

J. J. Johnston, for defendant.

FITZGERALD, J.:—In this case application is made by plaintiff for an order to have defendant's pleas setting up the loss of two notes sued on, struck out, the plaintiff giving satisfactory security.

Before suit brought plaintiff told defendant the loss of the notes and offered him orally any required indemnity. After suit and before declaration, plaintiff's attorney wrote to defendant's attorney, making him a definite offer of indemnity, giving the names of two sufficient sureties. No reply was made to this letter, but the pleas were filed setting up the loss of the notes.

The plaintiff is entitled under s. 69 of the Bills of Exchange Act, 1890 (which in substance is the same as s. 280 of our C. L. P. Act 1873 and s. 3 of 27 V. c. 6), to the order

asked on payment of costs. The only question is what costs? I think defendant should be paid the costs of the suit up to the date of the letter, though no formal bond was then tendered. This is an equitable matter, and it is not fitting that after such an offer, defendant should remain silent and make costs by filing these pleas. As to the defendant's costs of this application they must be paid by plaintiff, as, until sufficient indemnity is actually given, the costs of settling and ordering it must be paid by party whose duty it was to give such indemnity.

The form of the order will be, as the suit still continues, "that upon plaintiff giving an indemnity to the satisfaction of the deputy prothonotary—if the parties differ—against the claims of any other person upon the notes sued on, the defendant Thomas B. Reilly shall not set up further in this action the loss of these notes, and that the pleas of loss be struck out. And further that the defendant Thomas B. Reilly's costs of the suit up to the 22nd of January last (1906), and the defendant's costs of this application to be taxed, shall be costs in the cause to the defendant in any event of the cause.

See 5 Ont. P. R. 159; L. R. 6 C. P. 466; and 12 Man. R. 448.

NOVA SCOTIA.

FULL COURT.

JANUARY 12TH, 1907.

LOTT v. SYDNEY AND GLACE BAY RAILWAY COMPANY.

Street Railway—Negligence—Infant—Child of Tender Years Approaching Track—Failure of Motorman to Stop—Absence of Fender.

Appeal by the plaintiff from the judgment of MEAGHER, J., in favour of defendants in an action brought by plaintiff, an infant, by her next friend, claiming damages for injuries received through the negligence of defendants' servants in the operation of the defendants' electric or tram

cars, argued before WEATHERBE, C.J., TOWNSHEND, J., GRAHAM, E.J., and RUSSELL, J., on the 26th of November, 1906.

W. B. A. Ritchie, K.C., and H. R. Robertson, for appellant.

H. Mellish, K.C., for respondent.

WEATHERBE, C.J.:—This is an action for negligence in so operating defendants' car as to have caused the loss of the leg of a child one year and eleven months old.

It is contended that upon the evidence of defendants' servants they are liable.

It must at least be admitted that the child was seen approaching the car soon enough to have slowed down sufficiently to have prevented the accident.

In that respect alone, it was urged, there was disclosed, in the want of due care, ground to render defendants liable,

But plaintiff's contention does not stop here. Liability is put, it is said beyond doubt, inasmuch as when it became clear that the child, almost close to the track, after the car had been slowed, was practically safe, merely because it appeared to have turned its head without moving from its tracks, the motorman, to save time, ran the risk of putting on speed, which caused the damage.

When the child was seen approaching the track, at a speed which clearly would have caused collision, instead of coming to a stop, no doubt it was only slowed when the whistle was sounded.

The child stopped. It must have been clear that the sounding of a whistle could not have availed in the least degree to warn a child of tender years as it certainly would an adult. It might have had the opposite if any effect.

In point of fact at the very instant the child's head was turned, without even waiting a minute to see what it would do, speed was applied. At that very instant also the child hastened across the track and had its leg crushed by the wheel of the car.

The question therefore is whether the urgency of the business of the company was so great in making speed that a few seconds of time should not have been afforded at this critical juncture.

A motorman of experience—indeed a person without experience—must have seen—and this is not denied—that if the child should not either remain still or retreat but hasten forward, collision would follow. Evidently the motorman and his companion, who was in training, both saw this. But the excuse offered for putting on speed was that it was supposed the child indicated by the turning of its head that it was about to turn round and retreat, as one who had reached years of discretion might have done.

But even in the case of an adult one might have supposed that less than a minute of time might have been accorded to be sure that it was safe to proceed.

It is contended that it was glaringly apparent, from the time the child was seen, to the most ordinary intelligence, that it would be impossible by any means available to warn a mere infant—that fact would have flashed instantly upon the mind of a car driver with the slightest training; that if it were possible for the child when first observed to reach the track before the car could have been propelled safely past that point, speeding the car would have endangered its life, because it was a mere matter of impulse at what instant it would have made its utmost effort to reach the danger point.

In such a case the only safe course, perhaps, would have been to have removed the approaching child from the track, just as it would have been necessary to have removed a drunken man or a horse and carriage without a driver.

That, however, possibly imposes greater restriction against the defendants than is necessary to bring them within the conditions of this case.

Here the child had almost reached the track. It certainly was just as likely to proceed as to return. At any rate there clearly was uncertainty whether it would retreat. No one could count on the impulse which might move the infant. No one ever does. Here were grown men who may reasonably be supposed to be familiar with every obstruction that could be presented to impede the cars, especially the obstruction by obtruding infants.

The learned trial Judge, describing the villages on the route of the track under discussion, says:

“In these places there are many children of all ages and conditions, some of whom have custodians to look after

their safety, but many of whom have little or no care bestowed upon them, and are left to come and go and remain where they list without restriction or protection. Many of them use the streets as playgrounds."

If instead of this infant there had been a wandering unattended team with a truck slowly nearing the track in front, heavy enough to endanger the cars and passengers, would the motorman consider it prudent, because he supposed it possible the team might turn, to increase the speed?

The obstruction of the child did not endanger the lives of the passengers, including the drivers, or the property of the company. All that was endangered was its own life and limbs.

In the judgment appealed from there seems to be little difficulty in reconciling the facts. This case is free from contradictory evidence. What is challenged by appellant is the principle on which the decision proceeds.

One thing must be said for the judgment, viz., that the facts could not be construed to reach any other decision than the learned trial Judge has found, considering the view he has taken of the responsibility of the defendant company; and inasmuch as he has expressed doubts, I feel less reluctant in being obliged to differ from the decision, as I do with much deference.

Considerations as to the "disarrangement of the time schedule," "inconvenience of passengers," "loss of business to the company," everything of a business nature, sink, I think, into insignificance in contrast with the sacred regard in which human life, especially of helpless children, is to be regarded under the law.

The following is from the decision appealed from: "The cars no doubt often meet with obstruction, producing delay, from teams and other causes, interfering more or less with the regularity in point of time of their runs, and if the extreme limit of care insisted upon for plaintiff is to be exercised, namely, that the motorman must stop every time a young child or a wayward one approaches at all near the track, and must remain at a standstill until the removal of the child to a place of absolute safety, either through its own volition or through the agency of a third party, or must leave his place in the car and remove the

child himself, and meantime keep the passengers on the car awaiting the execution of these movements before he proceeds on the trip; if, I say, this degree of care is to be exacted at the risk of being held liable for negligence if it is omitted, then burdens are placed on the electric lines which cannot fail to lessen their usefulness, interfering considerably with the promptness, speed, and accuracy, of the connection of their cars with other points on the line, and at the same time render travel uncertain, especially in and about places like Glace Bay, and the other mining towns and villages through and near which the defendants' line is operated. . . . These conditions would render the operation of the defendants' road burdensome and slow, if the degree of care claimed for is required to be observed in every instance. If this was a case of injury done by a private carriage there would be much greater force and point to the contention (adverted to) as to the course the driver should pursue towards a child such as this and under the circumstances in proof."

It is, I think, upon reasoning altogether different from the above that those responsible for the running of trams must be guided to save themselves from damages. And I feel sure that human life would be in much greater jeopardy than under the law it should be and is intended to be held, if a decision resting upon the reasons supporting this one were sustained. I must entirely dissent from the suggestions contained in what I have quoted.

No doubt if the grounds for the refusal to sustain plaintiff's claim which were questioned on the argument are to prevail defendants may escape, but I think where it is clear, as it is on the evidence in this case, that the driver refused to wait an instant to observe whether the infant facing towards and close to what was likely to be its destruction would really retreat, but instantly increased the speed which caused the damage to the child, which merely pursued the course it had been and was likely to follow, no clearer case of carelessness and reckless conduct could happen.

And the only excuse that can be offered emphasizes the weakness of the defence, namely, the urgency of complying with the time table and preventing the delay of passengers.

With regard to the absence of a fender, *Williams v. The Great Western R. W. Co.*, L. R. 9 Ex. 155, is applicable. The child was found in an unfenced public foot path which crossed the railway on the level. Defendants were by statute required to erect a gate or stile at their intersections, and the Court held that the neglect to fence was evidence of negligence, and that the fence might have prevented the accident. This case is cited in the decision at the trial, but the learned Judge seems to doubt whether it was not obligatory on the defendants to apply for the approval of fenders and attach them to their cars. I think the law required them to do so, and have no doubt the absence of the fender was clearly evidence of negligence. .

I am of opinion that the appeal should be allowed and plaintiff should recover, and that the damages should be assessed by referring the case for this purpose to the learned trial Judge.

TOWNSHEND, J.:—I agree with the decision of the learned Judge below. I am unable to express my views any more forcibly than he has done in the reasons which he has given. The only point that I had any doubt about was as to the want of a fender, but on the whole I come to the same conclusion that the Judge below did, and I think the appeal should be dismissed with costs.

GRAHAM, E.J.:—I agree with the Chief Justice.

RUSSELL, J.:—I also agree with the Chief Justice.

NOVA SCOTIA.

WEATHERBE, C.J.

JANUARY 11TH, 1907..

REX v. HOARE.

Intoxicating Liquors—Canada Temperance Act—Conviction for Third Offence—Proof of Previous Convictions—Certificates of Convicting Magistrates—Oral Evidence of Contents of Previous Informations.

The prisoner David Hoare was convicted on the 10th December, 1906, by the stipendiary magistrate for the town

of Stellarton, of a third offence against the second part of the Canada Temperance Act, and was sentenced to imprisonment for three months. Previous convictions against him were proved by certificates of the convicting justices, as permitted by the statute, but the dates of the informations on which these convictions were based, were proved by a statement in the certificates and by the oral evidence of the prosecuting solicitor. The prisoner's discharge was moved for on the ground that there was no evidence before the stipendiary magistrate that the informations on which the convictions for the first and second offences were founded, were laid before the commission of the offence, charged as a third offence.

J. J. Power, for the prisoner.

W. B. A. Ritchie, K.C., and W. McDonald, for the prosecutor.

WEATHERBE, C.J.:—The sub-section provides for making the conviction for several offences on the same day, provided the increased penalty shall be for offences on different days and after information laid for a first offence.

Literally construed, no doubt in such latter case no increased penalty could be recovered without proof of the information.

In the same section provision is made for proving the "number of such previous convictions," by the production of a certificate, but no such convenient method of proving the "information," which in fact may be laid before a different magistrate, is provided. Therefore the question here is whether some person who may have read the information can come before the justice and orally prove such document, which is the case before me. I think this is not legal proof, and as a matter of course no authority for it could be shewn.

In New Brunswick it was decided by a strong Court, Palmer, King, and Fraser, JJ., under this same clause, that such information cannot be proved even by the magistrate's certificate of the previous conviction: *Ex parte Edgar*, 31 N. B. R. 128.

What I suppose was chiefly relied on by the prosecution was that this matter cannot be inquired into, and that this is not an objection that goes to the jurisdiction, but I think

it is a question, in the words of King, J., in *Reg. v. Troop*, 29 S. C. R. 675, collateral to the merits and upon which the limit to jurisdiction depends.

I have gone through the numerous cases cited, most of which have already been frequently discussed in this Court, and I would willingly go fully into them now if any good result would follow.

The prisoner must be discharged.

NOVA SCOTIA.

GRAHAM, E.J.

JANUARY 12TH, 1907.

MCLEAN v. CAMPBELL.

Appeal—Notice of Appeal—Extending Time—Supreme Court of Canada.

Motion for leave to appeal to the Supreme Court of Canada.

W. F. O'Connor, for the motion.

J. B. Kenny, contra.

GRAHAM, E.J.:—When this case came on for trial there was a motion made to stay proceedings, because the plaintiff had never paid some costs of appeal taxed against her, and was residing out of the jurisdiction. I went on with the trial, reserving judgment on the motion, and the jury brought in a verdict for the plaintiff. Then I gave judgment staying plaintiff's proceedings until security for costs was given. The plaintiff never gave security for costs, but the defendant had to go to the Court in banc on appeal to get rid of the verdict of the jury against him. The Court in banc dismissed his appeal. Then he gave notice of appeal to the Supreme Court of Canada from that judgment, and a bond for security for costs of appeal to the Supreme Court of Canada was presented to me for approval. But it appears that, inadvertently, the notice of appeal was a day or two too late. At any rate I thought it was necessary to have the time for asserting an appeal extended.

Then the defendant died and the executors had to be placed on the record. The matter has stood over from time to time, but has finally come up for disposition. I will extend for thirty days from the date of this order the time for giving notice of appeal to the Supreme Court of Canada and putting in security for the appeal in a bond to my satisfaction.

The only terms I impose will be the removal of the stay of proceedings, to which I have referred, without costs. I think there ought to be no costs of this application.

NOVA SCOTIA.

FULL COURT.

JANUARY 12TH, 1907.

ST. CHARLES v. ANDREA.

Attachment of Debts—Money Deposited in Bank by Judgment Debtor in Name of His Wife in Fraud of Creditors.

Appeal from the judgment of MCKENZIE, Co.J., argued before WEATHERBE, C.J., TOWNSHEND, J., GRAHAM, E.J., MEAGHER, and RUSSELL, JJ.

W. A. Henry, for appellants.

H. Mellish, K.C., for respondent.

GRAHAM, E.J.:—I am of opinion that in whatever way the facts are found in this case, there is a dilemma for the creditor who has instituted garnishee proceedings against the wife in respect to a judgment which he recovered against the husband. The dilemma is this: Either the money deposited in the Union Bank (\$380) at the time of service belonged to the wife under the protection of the Married Women's Property Acts, or, if it did not, it was money acquired and placed there by the husband in fraud of the creditors of the husband under the former Married Women's Property Act, as to the earlier items, and the present Act as to later items, and also the Statute of Elizabeth.

The learned Master who tried the issue under the garnishee proceedings has found in favour of the latter view, and I may say I entirely agree with him. Of course if the former view is correct, the question is determined. But if the learned Master is correct, the judgment creditor has mistaken his remedy.

By the Married Women's Property Act, s. 12, it is provided that any moneys so deposited or invested (that is, in the name of the wife in fraud of the creditors of the husband), may be followed, as they might be before the Act.

The garnishee provision requires that it should be shewn that "any other person is indebted to such debtor." Then the Judge may order "that all debts owing or accruing from such third person (hereinafter called the garnishee) to such person shall be attached," etc.

I assume that the case of a wife is not different from that of a third person—it might be his clerk or a friend—whom he had permitted to take the property of the business and invest in his own name to defeat creditors.

The difficulty is that a fraudulent arrangement of that kind is always good as between the parties, and only void or liable to question as to creditors. Consequently the husband never could recover that sum from his wife (or a third person), and therefore it is not a debt due from the wife or a third person to the debtor and therefore not attachable. (Reference to *Vyse v. Brown*, 13 Q. B. D. 199; *Donahoe v. Hull*, 24 S. C. R. 690.)

The appeal will be allowed and the order discharged with costs.

WEATHERBE, C.J., and RUSSELL, J., concurred.

TOWNSHEND, J., read an opinion in favour of allowing the appeal.

MEAGHER, J., stated that he had prepared an opinion to the same effect.

NOVA SCOTIA.

FULL COURT.

JANUARY 12TH, 1907.

• REX v. McKENZIE.

Conviction—Removal by Certiorari—Power to Amend—Reduction of Term of Imprisonment—Customs Act.

Motion to set aside a conviction, made by two justices of the peace for the county of Cape Breton, for a violation of s. 197 of the Customs Act of Canada as amended by the Customs Amendment Act of 1888, c. 14, s. 38, argued before WEATHERBE, C.J., TOWNSHEND, J., GRAHAM, E.J., MEAGHER, and RUSSELL, JJ., on the 27th of November, 1906.

The conviction was attacked, (1) as imposing excessive imprisonment in default of payment of the fine; (2) as adjudging a penalty of \$50 for the offence and \$18.20 costs, and in default imprisonment for six months; (3) as ambiguous and uncertain; (4) as made without jurisdiction.

J. J. Ritchie, K.C., for appellant.

W. F. O'Connor, for respondent.

GRAHAM, E.J.:—This is an application to quash a conviction made under the Dominion Acts, 51 V. c. 14, s. 38, which has been removed into this Court by a writ of certiorari.

The defect is that the term of imprisonment imposed, in default of payment of the penalty, is six months, whereas it could not, under the general provision in the Code, exceed three months, there being no term specified in the special section above mentioned for the case of default of payment of the penalty.

The prosecutor claims that it should be amended by reducing the term.

Section 889 of the Criminal Code provides: "No conviction or order made by any justice . . . shall on being removed by certiorari be held invalid for any irregularity, informality, or insufficiency therein, provided that the Court or Judge before which or whom the question is raised, upon perusal of the depositions, is satisfied that an offence of the

nature described in the conviction . . . has been committed, over which such justice had jurisdiction, and that the punishment imposed is not in excess of that which might have been lawfully imposed for the said offence. . . . Provided that the Court or Judge where so satisfied as aforesaid shall, even if the punishment imposed . . . is in excess of that which might lawfully have been imposed. . . have the like powers in all respects to deal with the case as seems just as are by s. 883 conferred upon the Court to which an appeal is taken under the provisions of s. 879.

Turning back to s. 883, we find it in the following words: "In every case of an appeal from any summary conviction, . . . the Court to which such appeal is made shall, notwithstanding any defect in such conviction, . . . and notwithstanding the punishment imposed, . . . may be in excess of that which might lawfully have been imposed, . . . hear and determine the charge . . . on which such conviction has been had . . . upon the merits, and may confirm, reverse, or modify, the decision of such justice, or may make such other conviction . . . in the matter as the Court thinks just . . . and such conviction . . . shall have the same effect and may be enforced in the same manner as if it had been made by such justice. The Court may also make such order as to costs to be paid by either party as it thinks fit."

The defendant contends that the Court must be satisfied upon a perusal of the depositions that the offence charged was committed, and must also retry the case by having the witnesses orally examined before it before amending the conviction. That would be inconvenient at least, particularly in a case in which only the wrong sentence has been passed, and all that remains to be done is to pass the right sentence.

The powers conferred upon the County Court (in case of defect in the conviction or excessive punishment) are: (1) to hear and determine the charge upon the merits; (2) reverse or modify the decision; (3) make such other conviction as the Court thinks just.

This Court on certiorari is to have the like powers.

The County Court has not the depositions before it (s. 888). But this Court in such a case has, and is to satisfy itself from a perusal of them that the offence has been

committed. As the application to quash the conviction brought up upon a writ of certiorari usually takes place before a court of appeal (as in Nova Scotia), when the facts are brought forward and disposed of upon evidence already taken, there would be a strong presumption that the powers conferred are to be exercised according to the practice of the Court. There is nothing in the expression "hear and determine" which limits the investigation to oral testimony. The words "hear" and "hearing" were expressions most commonly used to express the act of the Court in disposing of cases upon evidence already taken.

The expression "heard and determined" on appeals from justices is satisfied without a trial by witnesses: *Rex v. Cawston*, 4 D. & R. 445. If the case has to be tried by witnesses *de novo*, why make it a condition that the Court should be satisfied (that the offence has been committed) only upon a perusal of the depositions? The defendant's rights would be amply guarded if the provision was that it should be satisfied upon affidavits, a very usual way of applying for amendment, if afterwards a conviction could only take place upon a trial *de novo*.

It is not the practice in Ontario, I infer, to hear the witnesses over again in order to apply s. 899. I can find no case in any other province upon the point except one from the North-West Territories. (Reference to *Reg. v. Murdoch*, 4 Can. Crim. Cas. 82; *Reg. v. Spooner*, 4 Can. Crim. Cas. 209; *Rex v. Mickleham*, 10 Can. Crim. Cas. 382; *Reg. v. Whiffin*, 4 Can. Crim. Cas. 141.)

In England the Queen's Bench Division, under 12 & 13 V. c. 45, s. 7, is given a similar power in the following words: "It shall be lawful for the Court upon such terms as to payment of costs . . . to amend such order or judgment, and to adjudicate thereupon as if no such omission or mistake has existed."

Perhaps "adjudicate" is a slightly different expression from this, but it might as well be contended that the Queen's Bench Division could only determine the case by hearing the witnesses orally. To show that this is not the practice, I refer to *Reg. v. Walker*, 45 J. P. 683, where the punishment was reduced: *Reg. v. Higham*, 7 E. & B. 557; *Reg. v. Hellingley*, 28 L. J. M. C. 167; *Reg. v. Lundie*, 31 L. J. M. C. 157.

In my opinion, the term of imprisonment for non-payment of the penalty should be reduced to three months, the conviction amended accordingly, and the motion dismissed, but without costs.

MEAGHER, J., concurred.

TOWNSHEND, and RUSSELL, JJ., read concurring opinions.

WEATHERBE, C.J., dissented, on the ground that the Court, as a preliminary to the hearing of the appeal, had not arrived at the conclusion from reading the depositions that an offence had been committed.

PRINCE EDWARD ISLAND.

FITZGERALD, J.

JANUARY, 1907.

GALLANT v. DUNN.

*Trespass — Boundary — Possession — Conventional Line—
Estoppel.*

Action of trespass brought by the plaintiff against the defendant to try the title to a strip of land.

Neil McQuarrie, K.C., for the plaintiff.

J. E. Wyatt, for the defendant.

FITZGERALD, J.:—It appeared by the evidence that a block of land of 82 acres was in 1871 granted by the government to one Doucette Bernard. This land lay on the north side of the McIsaac Road, with ten chains frontage, and the side lines ran north 82 chains.

The plaintiff claimed title to the western half through Francis Arsenault, who bought from Bernard the original owner. The defendant claimed through Joseph Cormier, who bought it from the purchaser at a sale by the government for the non-payment of the instalments of purchase money due by the original purchaser, Bernard.

In 1885 Cormier went into possession of the eastern half, and the following year Arsenault went into possession of the western or plaintiff's half. At that time it was all wilderness land excepting a few acres cleared on the road.

The descriptions in these deeds are as follows: In plaintiff's: "All that tract, piece, or parcel of land situate, lying, and being on lot or township number fourteen in Prince County aforesaid bounded and described as follows: On the south by the road known as the McIsaac Road, on the west by land formerly in possession of Isadore Gallant, on the north by the land now or lately owned by James Yeo, and on the east by land in the possession of Joseph Cormier, containing an area of forty-one acres of land, a little more or less."

The description in defendant's deed reads as follows: "All that tract, piece, or parcel of land situate, lying, and being on lot fourteen in Prince county bounded as follows: Commencing at a point on the north side of the McIsaac Road where the western boundary of lands formerly in the possession of one Eli Bernard and now of one Henry McDonald intersects the said road, thence north and following the said westerly boundary eighty-two chains or to the rear line of farms fronting on the north side of said road, thence west along said rear line five chains or to the east boundary of lands formerly in possession of Frank Arsenault, thence south and following the said east boundary last mentioned eighty-two chains or to the said road, thence east along said road to the place of commencement, containing forty-one acres of land, a little more or less."

From these descriptions and the evidence given it is impossible for me to say where the true line of the easterly and westerly division of these two farms is.

The first description gives no measurements at all, and the evidence shewed that its western boundary, namely, the land formerly in possession of Isadore Gallant, did not then, nor does it now, run due north and south, but has an eastern deflection.

Then the defendant's deed in which his land is described from a starting point in south-east corner of the whole block of 82 acres, when it describes the rear line, reads, "thence west along said rear line five chains or to the east boundary of lands formerly in possession of Frank Arsenault, thence

south and following the said east boundary last mentioned 82 chains."

Where the eastern boundary of Arsenault's land was at that time, no evidence was given to shew. And it is quite impossible for me to determine it now, or what was the intention of the parties. Certain it is that the western boundary of the whole plot of 82 acres is in neither of these deeds described as a line running north and south. The evidence shewed that Gallant's holding was occupied some years before this division and that his eastern line ran from 20 to 35 minutes east for a distance of some 35 chains north from the McIsaac road.

The dividing point on the north side of the McIsaac road is admitted, and the line from it, as it runs north for some five chains, is also admitted.

The evidence shewed that some fifteen or sixteen years ago, the then two occupants, Arsenault and Cormier, desiring to ascertain their division line and to divide the block of 82 acres between them equally, measured the distance, east and west, between the eastern and western boundaries of the 82 acres, as they found them, and dividing that in half, fixed the one half distance as their dividing line. They made those measurements on several occasions, and as they cleared, until they had cleared and cultivated for some sixty chains back from the road. They both did the fencing along this division, and during their occupancy for some fifteen years after, they severally kept their allotted portion of this fence in good repair, and both cultivated and cropped up to it. The fence was a good and substantial rail fence.

The defendant, Dunn, became the owner in 1904, and in the following year, 1905, erected a piece of wire fencing in the plaintiff's cultivated land, to the westward of the fence on the dividing line, ascertained as I have described. This fence is some twenty chains in length, and at the southern end is six feet to the westward of the established fence, or conventional line, and at its northern end some 17 feet westward of such line. It is placed on a line running (according to recent survey) due north from the agreed on division point on the McIsaac road, and commences at a point some 15 chains north from the road; and this is now claimed by defendant to be his true western boundary. It is not connected with the conventional fence which is still standing. It is an isolated strip of fencing in an open field. It is contended

that it is on the true division line, as it is in a line due north from a settled point on the McIsaac road.

The first several owners, Arsenault and Cormier, might have made what is called the true line (bearing in mind that the original deed of the whole plot described the side lines as running north), their division, but so far as I am able to construe the language of their deeds, they took the then existing side lines of the farms adjoining the 82 acres, on the west and east, as their boundary lines; and adopted as correct the then existing occupancy of the first of them in possession.

This is an action of trespass, in which the possession is in issue.

The plaintiff had and has possession of the whole field in which this piece of wire fence is erected; this fence being in his view but an obstruction and nuisance in his cultivated land. The defendant has made no attempt to prove leave and license; his only substantial defence being his second plea, that the land is not the plaintiff's as alleged.

In proof of this he says: I own the land up to this wire fence, and claim to be in equal possession of it and the possession follows the title.

The evidence of his possession, except the fact that he was necessarily on the ground when he erected the wire fence, is not satisfactorily proved, but supposing it was, I am in this position. There is an unmistakable doubt as to where the true dividing line between the parties is, but their predecessors in title (being possessed for nearly 20 years), after a few years' occupancy, met together and determined and agreed upon a line as being the dividing line between them, and upon the strength of that agreement and determination, and the fixing of a conventional boundary, the plaintiff's predecessor in title erects a substantial fence, and clears and cultivates, and improves the land up to that fence,—that being so I must now hold that the defendant is estopped from denying that that is the true dividing line between him and the plaintiff in this action: *Grasett v. Carter*. 10 S. C. R. 105.

Under any circumstances, the defendant is required to prove his plea, and establish the title in him. This he has not, in my opinion, done.

Let me further illustrate this doubt. The 82 acres on paper, in the government deed, or the true 82 acres, as the defendant would call it, has ten chains front and the same in the rear. The actual 82 acres as described in the division deeds has ten chains and thirteen links front, but no evidence was given me of the actual width at the rear. The established point on the road is one so established because a fence from it has been there over twenty years; not that it is the half of ten chains. As a fact the measurements shew that the plaintiff has by such a division five chains and nine links, and the defendant five chains and four links, and consequently no line run due north from it could possibly give the true line of division of the 82 acres as described in government deed.

Now take the description in defendant's deed, and begin as it does, at this south-east corner, remembering that that corner unquestionably gives a greater width to the 82 acres than it should by the government deed have. It then runs north along McDonald's boundary line 82 chains, thence west, you will remember, five chains, or to the eastern boundary of plaintiff's land.

Now where do these five chains come from?

There was no evidence before me of any attempted survey of the rear end of either of these farms. For aught I know, a line running south from that point would come to the eastward of the wire fence; as a supposition, I would presume it would, for it is started from a shorter base. One is no better off, if instead of running the five chains you run "to the east boundary of lands formerly in possession of Frank Arsenault," meaning, if you like, his true boundary: *Connell v. Jackson*, 9 Metc. 154.

Where is that? I had not a tittle of evidence to shew me, nor does any deed shew me. Again, no description in either deed begins on this division on the road, only settled by use and the statute. What right has the defendant to run north from that, and claim that the division line under his documentary title? None, that I know of.

The damages I assess at \$5.

The judgment will therefore be for the plaintiff on all the issues raised, damages \$5, and as this action was brought to try a right, and fit to be brought, I will not certify against costs.

NEW BRUNSWICK.

FULL COURT.

JANUARY 11TH, 1907.

REX v. CLARKE.

Criminal Law—Attempt to Commit Rape — Evidence—Descriptions of Alleged Assailant—Rebuttal of Statements of Witness for Prisoner as to Prisoner's Whereabouts—No Substantial Wrong or Miscarriage.

Case reserved after conviction of prisoner for attempting to commit rape, argued before TUCK, C.J., HANINGTON, LANDRY, MCLEOD, and GREGORY, JJ., on the 18th of December, 1906.

The Attorney-General of New Brunswick (Pugsley, K.C.), for the Crown.

J. B. M. Baxter, for the prisoner.

TUCK, C.J.:—At the September, 1906, Circuit Court holden for the city and county of Saint John, the prisoner was convicted, that he did on the 4th day of August then last past, unlawfully commit an assault upon Ethel P. Train, a young girl at that time thirteen years and eleven months old, with intent to commit upon her person the crime of rape.

I have read the evidence given at the trial, and without hesitation come to the conclusion that the testimony was ample to justify the verdict of "guilty" found by the jury. Ethel P. Train and May Short, who was with her at the time of the assault, swore positively as to the appearance of the man, and their identification of him was complete. They described his facial appearance, the stoop in his back, the clothes he wore, the rent in the back of his coat, his canvas shoes, and other details, all of which pointed to the prisoner as the person who committed the crime.

If the evidence of the prisoner and his wife, Ada Clarke, is to be believed, the prisoner was not on the Milledgeville road (where the assault is sworn to have been made) at all on Saturday the 4th day of August, that he was not within miles of it, and that he never saw the girls Ethel P. Train and May Short, until the next day (Sunday), which was after he

had been arrested, and then he saw them in the office of the chief of police.

Beyond doubt the jury had the right to believe the evidence given on behalf of the Crown, and to disregard that of the prisoner and his witnesses.

At the end of the trial and after a verdict of guilty had been rendered, Mr. Baxter, for the prisoner, asked to have a case reserved. This was acceded to by the learned Judge before whom the cause was tried. While the learned Judge had doubts on only one point, he reserved all the grounds taken by the prisoner's counsel. They are chiefly on the improper admission of evidence. I take the grounds from the report of the learned Judge; and first, he says: "After the wife of the prisoner had concluded her testimony I permitted her to be re-examined at her home in the presence of both counsel, and this took place:—The Attorney-General:—Q. "Did you not on Sunday the 5th of August last at your house tell policeman Greer that your husband was working all day Saturday? A. No, I did not." The learned Judge allowed officer Greer to be called to rebut this answer of Mrs. Clarke. In doing so, I think the Judge exercised a wise discretion. He gives his reasons as follows: "I believe that I could use knowledge obtained on the former trial as well as the knowledge gained on this, and I was sure Mrs. Clarke knew what occasion was referred to by the Attorney-General. On the former trial she had been asked very minutely as to the conversation with officer Greer on the 5th of August at her home, and her recollection seemed distinct as to the occurrences of that day." I have no objections to make to the reasons, and think that the evidence was properly admitted.

Statements of May Short and Ethel P. Train to police officers were also admitted. As to these statements the learned Judge says: "They were only general, such as:—Did you describe the man, the coat, the boots, the moustache, the clothes? I did not permit them to state what description they gave, but only to state that they had given descriptions." Had I been the presiding Judge, and had the Attorney-General urged it, I would have gone further and allowed the girls to state what description they gave. It seems to me, that in the interest of good police government, and that criminals may be apprehended, it is absolutely essential that police officers should get, where it is possible, a description of the person who committed the alleged crime. Otherwise many a

criminal might not be arrested. If then a witness may be asked if he gave a description, why may he not also state what description he gave? I can see no objection to such evidence, more especially where the description is given very soon after the commission of the crime.

The same reasoning applies to the admission of the evidence of police officers Corbit, Jenkins, Caples, and Greer, who were allowed to state the descriptions given them, upon which they looked for the man.

The next objection to the admission of evidence, and really the most important, and the only one as to which the learned Judge had any doubt at the trial, is to the questions put to Louis Train, the father of Ethel, and the answers. It appears that on cross-examination Mr. Baxter put these questions to Ethel Train: Q. "As a matter of fact did you not know of your father sending a message to some of the police that there was some other man who had assaulted you? A. Yes, sir. Q. Do you know what man it was your father said? A. I do not. Q. From the description you gave your father he picked out another man? A. Yes." In consequence of this evidence, given on cross-examination of Ethel Train, the Attorney-General was allowed to put the following questions to Louis Train: "Q. When did your daughter first give a description in your presence of the man who had assaulted her? A. It was in the evening when the officers were in the house. That was Saturday evening, the same evening as the day she had been assaulted. Q. What time of the evening was it? A. I do not remember, but I think it was somewhere round eight or half past. Q. Your daughter was upon the stand yesterday and in answer to my learned friend Mr. Baxter stated from the description which your daughter gave of the man who made the assault that you thought it answered to the description of another person? A. I made the remark to that effect. Q. I want you to tell it slowly and distinctly the description which your daughter gave of the man and his clothing." After objection had been made to this question, and it had been allowed, with the expression of the Judge of some doubts, the Attorney-General put the following: Q. What was the description which your daughter gave of the man? A. She said he was a middling large man, a kind of a dark sandy moustache and his cheek bones were kind of high and kind of red faced. She said the gentleman had a kind of dark blue suit on, he had canvas shoes with

leather straps, toe taps and leather across the instep, and I think she said he had a hard hat on, and she spoke about a tear in the back of the gentleman's coat either under the arm or below the shoulder, and I think she said he wore a kind of Dewey collar,—I do not know whether it was a stand up or turn down, but a kind of double collar. I think they call them Dewey collars. Q. From that description you thought it might apply to some person whom you named? A. I did at the time. Q. Did you know Clarke at that time? A. No, the first time I saw Mr. Clarke was when I came up to the station the following Sunday with the two little girls. Q. Who did you think it might be? A. I had been working out in Milledgeville previous to that, and only got through Saturday before this happened, and I was working for Alderman MacRae, and a man named Cunningham was putting up a barn for Mr. McRae, and he had a man, whether it was one of Mr. Cunningham's sons or another man he had working for him I could not say." He then said something about being excited and worried, which is not material, and then he continued: "As I was saying that night being upset and excited I would jump at any wild theory, and I mentioned about this man who had been working with Mr. Cunningham on Mr. MacRae's barn,—but I understood afterwards (objection). Q. Had you any conversation with this man before? A. No more than I would see him coming through the field to his work, and he may have passed the time of day. I do not know his name yet, if he is not a Mr. Cunningham. Q. Do you know as to whether or not there was anything in that man's speech or had you had talk with him yourself? A. The few remarks we did have he had a kind of stutter in his speech. Q. Did you ask Ethel as to whether the man who assaulted her had a stammer in his speech? A. Yes. Q. What did she say? A. She answered, no, he did not; he talked all right. Q. There were no steps taken to arrest this man? A. Not that I know of. Q. I want you to look at this coat? A. That looks very much like the coat the prisoner had on that Sunday afternoon that I took the girl up." The witness is then asked a number of questions as to the clothes the prisoner wore on Sunday as compared with clothes produced in Court. He says also that he never saw the prisoner until he saw him in the guard room after he had been arrested. This is all the evidence of Louis Train which has in any way relation to the case reserved. It was offered.

and received chiefly if not entirely because of the questions put to Ethel Train on cross-examination.

What the Crown wished to show was that the description Ethel gave to her father on the Saturday was substantially and in effect the same as that she gave in Court at the trial. Mr. Baxter's object was to impress the learned Judge and jury with what he would argue must be the fact, that she had given a different description to her father from that which she had given in Court, and this had led her father to suspect another man. If the father had not been called, and no evidence had been given as to what description the daughter did give to him on the Saturday, one with experience in the courts can readily see with what startling effect the prisoner's counsel would have urged this telling circumstance to the jury, and would probably have gone further and said how easy and how entirely right it would have been for the Crown to have called the girl's father to show just what description of the man she had given.

Having had at first some doubts to the admissibility of this testimony, I think now that the Attorney-General would have been almost derelict in his duty had he not called Louis Train, and asked him the questions to which objection has been taken.

To my mind the objection to this testimony goes rather to its force than its admissibility. I can understand counsel arguing forcibly before a jury that they ought not to give weight to this evidence of Louis Train, because he had got one description from his daughter on the Saturday night, and got the other one from the testimony she gave in Court. But it seems to me that the objection just named goes rather to the weight of the testimony, than to its admissibility.

Again it may be said, that if this evidence is bad in itself, no cross-examination of Ethel Train by Mr. Baxter can make it good. I have no doubt that the learned Judge would have rejected Louis Train's evidence to which objection is made, had it not been for the previous cross-examination. But in my opinion that (the question on cross-examination of Ethel Train) made it imperative upon him to receive it. What otherwise might have been improper evidence, is rendered necessary and proper by the circumstances of this case.

But even if this and other evidence was improperly admitted, I think under s. 746, s.-s. (f) of the Criminal Code,

there should not be a new trial, but that the conviction ought to stand. This section provides "that no conviction shall be set aside, nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial, or some misdirection given, unless in the opinion of the court of appeal some substantial wrong or miscarriage was thereby occasioned on the trial."

If it were necessary to rely on s. 746 of the Criminal Code (and with my view it is not), I should think that this case is fully covered by the proviso.

I have carefully read the charge of the learned Judge and think that there is no misdirection. There is certainly none which could have misled the jury. The Judge stated at the argument before this Court, as it is also stated in the case reserved, that he did not charge the jury that there was a presumption against the truth of a prisoner's testimony; that he did not, without qualification, charge the jury that the only inference to draw from the evidence was that an attempt at rape had been committed. Take the evidence altogether, or take any part of it, I think it would have been absurd to have asked the Judge, or to think that he ought to have charged the jury, that they might find the prisoner guilty of an offence less than the one charged in the indictment. The prisoner was either guilty as charged, or he was not guilty at all, as he swore. There was no common assault about it. Under the evidence he might have been found guilty of rape but not of common assault.

I think the conviction must be affirmed.

LANDRY, J.:—The indictment contained but one count, that was an attempt to commit rape. The proof of the commission of the crime and of the identity of the prisoner was ample: free from doubt as to the identification; not so clear that actual rape had not been committed. The counsel for the prisoner asked for a reserved case on the following grounds: Improper admission of evidence;

1. In recalling Mrs. Ada Clarke and asking her as to a statement supposed to have been made by her to officer Greer, in the absence of the prisoner, to the effect that he had "been working all day Saturday."

2. In allowing officer Greer to be called in rebuttal of Mrs. Clarke and to be asked whether she had not said to him

that the prisoner had been working all day Saturday, because (a) the statement if made by her was made in absence of prisoner and therefore not admissible against him: (b) the circumstances of the supposed statement were not sufficiently designated to her. She was asked as to a statement; Greer's evidence was as to a reply. It was in evidence that she had seen Greer twice on the day in question and the occasion was not particularized in her cross-examination; and (c) Mrs. Clarke's statement was as to a matter not material to the issue, and therefore could not be rebutted.

3. In admitting statements of May Short and Ethel Train made to police officers and to Louis Train as to the description of the assailant of Ethel Train, and statements of Louis Train, such statements not being, (a) part of the *res gestae*; nor (b) made in the presence of the prisoner; and (c) statements made by May Short not being admissible under any circumstances, no assault having been committed upon her; (d) statements made by Ethel Train not being admissible as consent not involved in the crime; (e) statements all too late, as when admissible at all only those first made are so; (f) evidence of Louis Train not being admissible under any circumstances.

4. In admitting evidence of the police officers, (a) as to statements to them by May Short and Ethel Train as to description of assailant of Ethel Train; (b) that they, the officers, were looking for a person answering to a particular description given by Short or Train; (c) that in consequence of what they were told by Short and Train they went to certain places and did certain things.

Misdirection: (1) In telling the jury that there was a presumption against the truth of a prisoner's testimony. (2) In telling the jury that the only inference they could draw from the testimony was that an attempt at rape had been committed if they believed the testimony at all.

Non-direction: (1) In not telling the jury that they might find the prisoner guilty of indecent assault.

The case reserved was submitted to the Court in the words following: 1st. After the wife of the prisoner had concluded her testimony, I permitted her to be re-examined at her home in the presence of both counsel, and this took place: "The Attorney-General: Q. Did you not on Sunday the 5th of August last at your house tell policeman Greer that

'your husband was working all day Saturday'? A. No, I did not."

2nd. I permitted officer Greer to be called in rebuttal to this answer of Mrs. Clarke. In so doing I believed that Mrs. Clarke could not be mistaken as to the particular occasion, the 5th of August at her house. In the exercise of my discretion in this matter I believed I could use knowledge obtained on the former trial as well as the knowledge gained on this, and I was sure that Mrs. Clarke knew what occasion was referred to by the Attorney-General. On the former trial she had been asked very minutely as to the conversations with officer Greer on the 5th of August at her home, and her recollection seemed distinct as to the occurrences of that day.

3rd. I admitted the statements of May Short and Ethel Train to police officers. These statements were only general, such as:—Did you describe the man, the coat, the boots, the moustache, the clothes? I did not permit them to state what description they gave, but only to state that they had given descriptions. Neither of them was asked by the prosecution as to any description given by them to Louis Train. In the cross-examination, Mr. Baxter asked: "Q. As a matter of fact did you not know of your father sending a message to some of the police that there was some other man who had assaulted you? A. Yes, sir. Q. Do you know what man it was your father said? A. I do not. Q. From the description you gave your father he picked out another man? A. Yes."

The statements that I allowed Louis Train to make are set forth on pages 81 to 84 of the case.

4th. I admitted the evidence of police officers Corbit, Jenkins, Caples, and Greer, in a general way, only nothing further than to state that descriptions had been given to them, and with such descriptions they had looked for the man.

5th. I do not accede to the statement that I charged the jury that there was a presumption against the truth of a prisoner's testimony. I had no such intention.

6th. I do not agree to the statement that I charged the jury without qualification, that the only inference to draw from the evidence was that an attempt at rape had been committed.

7th. I omitted to tell the jury, in so many words, that the law permitted them, if the facts justified it, to find an offence less than the one charged.

The questions referred are as to whether I was right in the decisions I gave on the points involved in the above.

The grounds now to be examined can be divided into four, viz.:

1st. The wife of the prisoner having denied in her evidence that she made a statement to officer Greer inconsistent with a part of her testimony, was it error to permit officer Greer to rebut that denial?

2nd. Was it proper to admit in evidence the statement of the victim of the assault and of her companion who was with her during the beginning of the assault, that they had described to the police officers the offender and the clothes he wore on the occasion; and also was it error to receive admissions from the officers that they had obtained from the girls such descriptions? It must be remembered that in no case were the girls or the officers permitted to state what the descriptions were that they gave and received respectively.

3rd. Was it error to permit the father of the victim of the assault to state that his daughter gave in his presence a description of the prisoner; and was it proper to permit him to state what that description was?

The fifth and sixth grounds as stated are in reality not reserved, as the trial Judge denies not only the correctness of the interpretation of the prisoner's counsel of that part of his charge as reported, to which objection is taken, but also denies that his charge on the points raised is properly reported.

4th. The seventh ground calls for a decision as to whether it is error if the Judge in his charge on the trial on an indictment containing one count only, viz., an attempt to commit rape, omits to point out to the jury that the law on such an indictment permits the finding of a lesser offence than the one charged.

As to the first ground, the crime was committed between 2.30 and 3.30 on the afternoon of Saturday the 4th of August last. Mrs. Clarke gave a detailed account of her husband's whereabouts from about 12.30 to about 2 p.m. From about 2 to 4 she did not see him, but stated he had obtained ten cents from her to go and get a shave. From 4 on to

night, she described where he was, and what he was doing. Her testimony on that point was clear that the prisoner was not working on the afternoon of the 4th. That being her declaration she was asked by the Crown counsel: "Did you not on Sunday the 5th of August last at your house tell policeman Greer that 'your husband was working all day Saturday'?" She replied, "No, I did not." Here was a positive statement, if made to officer Greer, not only inconsistent with her evidence but contradictory of it in a very important particular. It seems to me quite established by authority, that evidence may be given in rebuttal under such circumstances. The principle has long been acted upon that where a witness has made to a third party a statement relative to the subject-matter of the case, and in his testimony he contradicts that statement, proof may be given that he did in fact make it. Before doing so, however, the witness's attention must be drawn to the person to whom he so stated the circumstance, the time, place of his so stating it, and such particularities as will convince the court that the witness so interrogated is not taken by surprise. The statute law, (Crim. Code, s. 701), goes further, and permits such a course even when the witness does not deny but will not distinctly admit that he made such a statement. In this case I believe the fact of the prisoner working or not working all day Saturday was clearly relevant to the subject matter of the case. But even if not strictly relevant, it was just such a false assertion of a fact as was full of meaning in relation of the wife's intentions as to what she desired to be believed in connection with her husband's doings that afternoon, and just such a circumstance, if she made the statement, as would prove her willingness to resort to falsehood to shield her husband. And if such a statement was made by the wife with the view of creating falsely a favourable impression of the prisoner's case, it was quite proper to have it submitted to the jury who had to pass upon her whole evidence. In this point, however, is involved more than the question of the admission of officer Greer's evidence. Were the conditions required for the admission of such evidence sufficiently established? The decision of that question is in the discretion of the presiding Judge; and I believe the person, time and place, were, in the question itself, brought to the witness's attention sufficiently to have her understand just what conversation was intended; and particularly had I reason to be-

lieve that, when I considered the other evidence in the case. The prisoner was arrested in her presence on that Sunday by officers Greer and Staples, and such a circumstance as that would naturally bring the witness's mind, when asked, to that Sunday, and to the officer who assisted in the arrest, and the conversation there had, and all that took place, and she would recall whether she spoke falsely then to officer Greer in relation to her husband's doings the day before. She could not well be mistaken as to that. Therefore my discretion was, in my opinion, rightly exercised in allowing the evidence of Greer with the knowledge I had obtained in that trial. But had I lacked information from the circumstances detailed in this trial, I had ample information from the evidence given by Mrs. Clarke herself on the former trial, heard not long before, wherein she was closely interrogated as to all the details of her conversation with Greer on that Sunday. I was not, however, driven to use that information.

Second point: It seems to me that this point is disposed of against the contention of the prisoner, by stating merely that neither the girls nor the officers were permitted to state what descriptions were given. All they were permitted to do was to state generally that descriptions were given and received. Such statements for the purpose of the discovery of an offender are necessarily and almost always made a part of the *res gestae*, and the fact of its being done is properly in proof.

Third point: I find more difficulty in disposing satisfactorily of the third point. Louis Train, father of the victim, was present some four hours after the assault when his daughter gave the police officers the description of the man who assaulted her. Already the victim had spoken on two or three occasions of the assault and of her assailant. First to Mr. S., the first person she met after the assault; secondly, to some police officers at a police-station within an hour or an hour and a half after her first meeting Mr. S. I do not take it that this conversation that Louis Train heard was addressed to him by his daughter. Had the statement been directly to her father, her natural and legal protector, and so recently after the fact as to preclude the probability of her being practised upon, I would think the evidence would be clearly admissible as a part of the transaction. Here I would think the meeting her father was too remote from

the assault to make the statement admissible on that ground; but are there not other circumstances in the case that would make the evidence of Louis Train good? The Attorney-General contends that the prisoner's counsel having in the cross-examination of the victim obtained from her the admission that from the description she gave in the presence of her father he concluded that the assailant was another man, it became necessary, in the interest of clearness and of justice, and to prevent incorrect inferences, to give the jury the best opportunity to judge as to whether she was consistent in her several descriptions or not, including that given by her in court, that what she did say should be given to the jury. I acquiesced reluctantly in that view and permitted the evidence. On further reflection I believe the contention of the Crown is right. Had the evidence been excluded a very strong but groundless argument would have been made to the jury that the father of the victim having pointed to another man as suiting the description given in his presence, it was reasonable to conclude that such description that she then gave was not the same as given in court. More particularly would such a presentation have had much force when it transpired that the man pointed to, who was brought into the court, and sworn, did not, in any particular, when confronted with the prisoner, suit the description given by the girl in court. Moreover, I believe that the obtaining by the prisoner's counsel from the victim the answer that her father had sent a message to some of the police that there was some other man who had assaulted her, and it being reasonably inferred that the message was sent on account of the description she gave in his presence, the Crown might give in evidence the description given, so the jury could judge how far the father was justified in arriving at the conclusion he did, and also to show that the description she gave in the presence of her father was not inconsistent with that given to the jury. I believe, therefore, that the defence having given evidence of the circumstances that resulted from the description given by the victim of the assault, taken with the evidence of the whole case, made the issue one of identity only. And to establish that identity it became important that no false impression that could be removed by Louis Train's evidence on that point should be allowed to be made by the absence of it.

The fourth point is not tenable. The indictment contained one count only. The evidence, if believed, established abundantly an attempt to commit rape, if not rape itself. No contradiction was given of that evidence, only such that might be inferred from the doctor's evidence. Outside of the doctor's evidence, the commission of the crime of rape was proven. The doctor's evidence could be considered only in determining whether rape had been committed or not, and as that was not involved in the issue I did not refer to it. In fact the only issue involved was one of identity. No question of a minor offence was raised by the evidence. Under such conditions it became superfluous to explain that the indictment permitted the finding of a lesser offence. As well require, when the evidence did not raise the question, a judge to explain that non-consent may be implied if the victim is made drunk by the assailant; or if she was asleep, or idiotic; or was betrayed in the belief that the assailant was her husband.

For these reasons I believe the verdict should not be disturbed.

HANINGTON, and GREGORY, JJ., concurred.

McLEOD, J., dissented, giving reasons in writing.

NOVA SCOTIA.

GRAHAM, E.J.

JANUARY 24TH, 1907.

BRAYLEY v. NELSON.

Building Contract—Defects in Building—Damages.

Trial of action.

C. R. Smith, K.C., for plaintiff.

T. S. Rogers, and S. Jenks, for defendant.

GRAHAM, E.J.:—The plaintiff contracted to build two cottages for the defendant for the sum of \$150 each, the defendant finding the materials. They were to be built like

another cottage owned by the defendant, and he stipulated that they were not to leak. They had been sold in advance to two persons, one Terrio and Alvin Nelson the defendant's son, and these people were in occupation at the time of the trial. The defendant had paid the plaintiff \$200 on account, leaving a balance of \$100 plus an extra of \$4 not disputed for which the plaintiff sues. The defendant has pleaded a defence and has counterclaimed for damages. The evidence satisfies me that both cottages were defectively constructed, particularly about the windows, and that the leaking, which was very bad, was due to such defective construction. I am also satisfied that the leaking was not due to defective materials.

I think that the sum of \$50 should be sufficient to compensate for the different defects proved by the defendant's witnesses.

The plaintiff will have judgment for the difference, the sum of \$54, and the plaintiff will have costs of the action and the defendant costs of the counterclaim, to be set off.

NOVA SCOTIA.

GRAHAM, E.J.

JANUARY 23RD, 1907.

MATHESON v. REID.

Trespass—School Rate—Distress—Second Distress—Abandonment after Abortive Sale—Arrest under Individual Warrant—Estoppel—Amendment—Costs.

Trial of action.

T. S. Rogers, and A. G. Mackenzie, for plaintiff.

J. L. Ralston, for defendant.

GRAHAM, E.J.:—The plaintiff, who owed a sectional school rate in the sum of \$2.92, was arrested under an individual warrant by the defendant who is a constable, and he has brought this action for damages. The action as at first brought was for assault and imprisonment. Just before

the trial came on at the sittings an amendment was made by adding paragraphs for trespass in respect to two alleged levies upon goods, namely, one on the 14th September, 1905, in respect to three cows; the other on the 26th September, 1905, in respect to two scythes, and other articles; also paragraphs for an alleged false return to the general warrant for the goods to the effect that he was unable to satisfy it, whereby the individual warrant to take the body was made available.

I take it for granted that every possible defence has been pleaded to this very extensive amendment, and if not I allow it to be done.

The plaintiff has acted very unreasonably about this small rate. He claims the dignity of the title of a passive resister, but I do not think he deserves it. He has not appealed from the rate at all events.

The constable went to his farm on the 14th September, 1905, with a warrant for this rate, which was very long overdue. The constable found nothing to levy upon except a mowing machine which the plaintiff referred him to. It was old and the defendant did not think it would yield anything at a sale, besides being inconvenient to haul away and handle for that small sum. Then he spoke of levying on some cows, but I find as a fact that he did not levy on the cows. Abner Mayne, the local lay lawyer, who was there assisting plaintiff against the tax, tried to persuade the defendant that he had levied upon them and that he must take them away—I suppose there was some trap about it—but I find that he did not do so. The constable said to the plaintiff: “I will take these cows, Mr. Matheson.” He said: “You need not take them; if you do you will have to bring them back. There is not a thing. I have given my property over to my sons to keep me, I am getting old.” I adopt the defendant’s testimony and I find that he did not intend to levy upon the cows, and there was nothing which amounted to a levy upon them. He returned without anything. Even if he had levied in fact he would upon that statement that they were his sons’, of course be justified in abandoning the seizure as I shall presently shew. And there was nothing to prevent the constable from levying again. He returned on the 26th September, 1905, and again demanded the rate. The plaintiff said he had nothing, there was nothing belong-

ing to him on the place. On this occasion he did not turn out the mowing machine even. The barn and the house were both fastened. He found however in the wood house and about the yard two scythes and snaths, two axes, one shovel, and one saw. These he took and advertised for sale. On the day fixed no one attended but Arthur Matheson, the plaintiff's son, and Abner Mayne, and of course there could be no sale. The defendant was served with two notices; one signed by the solicitors of the son, Arthur Matheson, demanding one of the axes as his property; the other by the same solicitors on behalf of the plaintiff demanding the other articles, and claiming that they had been unlawfully taken, and giving notice of an action for the return of the property and for damages in default of immediate delivery. The son's axe was worth \$1.25, and it is doubtful if the other articles were worth the amount then due. However the articles were returned. The constable made a return to the warrant that he was unable to find goods sufficient to satisfy the warrant. A justice of the peace, W. R. Slade, thereupon under the Act c. 73, s. 83, on the 14th October, 1905, issued a warrant against the plaintiff authorizing the constable to levy upon the goods and chattels and "for want of goods and chattels to be by him shown unto you" to take the body. With this warrant the defendant demanded goods sufficient to pay the rates, and the defendant said: "I will not give you anything." Thereupon the defendant arrested the plaintiff and took him to the gaol, when the defendant paid the rates and the proper fees and secured his discharge.

So far as the arrest and the imprisonment are concerned the warrant last mentioned protects the constable. And as to the claim in respect to making a return which was false and thus enabling a warrant to take the body to issue, I should think that it would be necessary to allege malice. But in my opinion there was a perfect justification for these things. There was no levy or retention of as levied in connection with any of the articles in question, and the return was not false. The defendant, as I have shewn, made no levy on the cows. He was justified in making no levy on the mowing machine on the first occasion, and his having made a levy on the scythes, etc., on the 26th September, and an attempted sale, when they were afterwards on demand returned, did not constitute such

a satisfaction of the claim as would prevent the subsequent issue and arrest under the individual warrant.

Reference to Freeman on Executions, s. 269; United States v. Dashiell, 3 Wall. 688; Green v. Burke, 23 Wend. 490, at p. 499; Weld v. Bumpass, 33 Am. Dec. 310; Young v. Cleveland, 82 Am. Dec. 155; Cornelius v. Burford, 91 Am. Dec. 309.

Without authority one would have supposed that the plaintiff after demanding the goods back as unlawfully taken, and having received them in return, would be estopped from saying that a levy had been made which barred a subsequent levy or arrest.

But I suppose the defendant having returned the goods on the assumption must be held liable in damages in respect to their taking and detention. Perhaps he should have held and advertised another sale. I assess the plaintiff's damages under, I think it is paragraph 5 of the statement of claim, in respect to the two scythes, two snaths, one axe, one shovel, and one saw, at the sum of one dollar. The defendant up to the time of trial, i.e., the amendment, was entitled to have the action dismissed with costs, and he is still entitled to the costs of all the other issues found in his favour as against this one issue found against him. The plaintiff will have the costs of that issue.

NOVA SCOTIA.

LONGLEY, J.

JANUARY 25TH, 1907.

SMITH v. WAMBOLT.

Costs—Contest as to Surplus Proceeds of Mortgage Sale.

Motion on behalf of the Acadia Loan Company to be relieved from payment of costs of motion, reported ante pp. 271-276 (No. 6).

A Whitman, for the appellants.

T. F. Tobin, for Mrs. Wambolt.

R. H. Murray, for the assignee.

LONGLEY, J.:—Mr. Whitman, representing the Acadia Loan Company, objects to costs against that company on the motion for surplus proceeds made on behalf of the assignee of Wambolt. The motion was opposed by Mrs. Wambolt and fully argued. Mr. Whitman appeared upon the argument and claimed that the Acadia Loan Company should have priority in the surplus proceeds. I rejected both the application of the assignee and the loan company and awarded the surplus proceeds to Mrs. Wambolt.

Mr. Whitman claims that he only argued the claim of his company as against the assignee. It is true he did not directly argue it against Mrs. Wambolt, but in his brief he declared that his clients were in the same position as the assignee as respects Mrs. Wambolt's claim, and he claimed \$289.10 as coming first to his clients as surplus proceeds. Under all the circumstances, I think the loan company should pay half the costs of the motion and argument, though it is evident that Mr. Whitman was seeking to set up his claim without involving the risk of paying costs to Mrs. Wambolt.

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NOVA SCOTIA.

WEATHERBE, C.J.

JANUARY 30TH, 1907.

AMERICAN HOTEL AND SUPPLY COMPANY v. FAIRBANKS.

Company—Extra-Provincial Company—Failure to File Statement before Doing Business—Contract—Illegality—Penalty.

Trial of action claiming damages for breach of a contract in writing which required defendant, during the period over which the contract extended, to make use in his hotel of an advertising inkstand cabinet supplied by plaintiffs. Defendant denied the statements in the statement of claim and for amended defence pleaded that plaintiffs were a foreign company, incorporated in Illinois in the United States, and had not complied with R. S. c. 127, as amended by Acts of 1904 c. 24, in relation to the registration of foreign companies.

W. B. A. Ritchie, K.C., and T. R. Robertson, for plaintiff.

H. Mellish, K.C., for defendant.

WEATHERBE, C.J.:—If any dispute could exist as to whether plaintiffs were doing business in Nova Scotia it would be set at rest by the pleadings, but the evidence shows they were.

By s. 18 of R. S. c. 127 every company not incorporated in the province, etc., shall before beginning business in the province transmit to the provincial secretary a state-

ment under oath showing among other things the corporate name of the company, where the head office of the company is situate, the amount of the authorized capital stock of the company, the amount subscribed and how much is paid, the nature of their business, the names of the directors and officers and who is the agent; and every company which fails to comply with these provisions shall be liable to a penalty of \$10 per day during the continuance of such default.

It is stated in *Leake on Contracts* that a statute imposing a penalty upon an act presumptively implies a prohibition though there are no prohibitory words, and an agreement involving such act is void for illegality. (Reference to *Bensley v. Bignold*, 5 B. & Ald. 335; *Cope v. Rowland*, 2 M. & W. 154.)

It is not disputed, I think, that if it appears directly or indirectly that the intention of an Act is to prohibit a party from doing business until he conforms to certain requirements he cannot recover for a contract made in carrying on that business.

The contract in question in this suit was made in the course of the business which it is contended was prohibited by s. 18 of the Act in question. The language of this Act is: "Every company not incorporated by or under authority of an Act of the legislature of Nova Scotia which carries on business in Nova Scotia . . . shall before beginning business in the province make out and transmit to the provincial secretary a statement under oath showing, etc."

It cannot be said that in the absence of any such statement as is here required this language is not prohibitory. It is clear that no such statement was transmitted, and therefore business carried on by a foreign company after the passage of the Act is within the mischief directly contemplated by the language used.

Counsel for plaintiffs contends that this Act was not intended to apply to foreign companies doing business at the time of the passage of the Act, but if foreign companies were shown to be doing business at the date of the Act that would afford reason why under the language used such companies should on the passing of the Act forthwith transmit the statement required. But I think there is no evidence that this company was doing business before the enactment.

As I read the amendment relied on by plaintiffs I think that the effect of this language would be to put an end to the business even if s. 18, s.-s. 1, had been complied with.

The defendant in my view is entitled to judgment with costs.

NEW BRUNSWICK.

HANINGTON, J.

DECEMBER 2ND, 1906.

WILSON v. CLARK.

*Work and Labour—Contract to Bore Holes for Iron Work—
Extras—Damages—Delays.*

Trial of action.

D. Mullin, K.C., for plaintiffs.

H. A. McKeown, K.C., for defendants.

HANINGTON, J.:—I think perhaps I will be able at the present time to decide this case, according to my views, as well as I would if I were to delay further.

This is an action brought by the plaintiffs against the defendants to recover for work and labour furnished them in connection with the construction of certain works on the Intercolonial station house, on or adjoining the Intercolonial station house in the City of St. John. It appears that the defendants had a contract for that work from the Government; that they applied to the plaintiffs to give them figures as to what they would do the boring and the riveting and bolting up of the iron work in connection with that work for. The plaintiffs did submit to the defendants a contract, which is in evidence, which is in these words and figures:—"Contract for ironwork on I. C. R. station. Agreement made between Messrs. Clarke & Adams, of the City of St. John, City and County of St. John, Province of New Brunswick, Contractors, of the first part, and Messrs. Wilson and O'Donnell, of the City of St. John, of the second part. It is agreed Messrs. Wilson and O'Donnell will drill or punch all holes required in the ironworks on the extension of the Intercolonial Railway station, St. John, N.B., according to plans and specifications, at the rate of five cents per hole, which

will include riveting and bolting up. Messrs. Adams & Clarke, contractors, will furnish all rivets and bolts and put up staging as may be required. Messrs. Adams & Clarke to do all hoisting and handling of heavy parts, and furnish room to work. Messrs. Adams & Clarke to pay Messrs. Wilson & O'Donnell weekly as the work advances up till Friday of each week. (Sgd.) Albert R. C. Clarke, (Sgd.) John A. Adams. Accepted—(Sgd.) Alex. Wilson, James O'Donnell."

This contract does not itself bear date, but appears to be made in the month of September, 1905. The evidence shows that at the time there was some conversation as to the time the iron would arrive for the work, which was to come from some part of the United States, or elsewhere, and which was to be furnished to the plaintiffs to be drilled and riveted and bolted. The defendants say they did not expect, and the plaintiffs were given to understand that the iron would not be there for some months; but in the meantime they had iron or material upon which they could proceed upon the doors, iron doors, that would be fixed in the station house leading out to this new work. The plaintiffs went on with the work and did the doors. Some time in October they were about completed, and the bills came in for the work by the plaintiffs to the defendants, in which bills were charged five cents a hole for each separate hole in each separate piece, and instead of five cents a hole for the whole of several assembled parts of iron to be riveted or bolted together. The defendants—and the plaintiffs substantially agree that the defendants said so—said that was not the proper way to be paid; the plaintiffs said it was. They were paid at that rate then, all but \$5, the defendants saying, "If that is the way you are going to charge we will not pay it" and the plaintiffs saying that was the way they would charge, and that that was what the defendants would have to pay. There was some dispute there with reference to that: the defendants in effect told the plaintiffs they would call the contract off, and they need not go on with it,—I think by letter as well, and substantially that they would not pay at that rate; the plaintiffs relying upon their contract said that they would be paid at that rate and that they would go on with the contract. In this dispute the plaintiffs went to their counsel, Mr. Mullin, who wrote the defendants a letter, saying that his clients had a right to go on with their contract, and would go on with it. The other side said in reply to that, in

effect, "If you go on, go on with your contract, and we will pay you accordingly." In other words, I think that these people having arrived at a position in which each disputed the contention of the other, rested on their legal contract, and as one of the plaintiffs says, "I went on with my contract, claiming this." The defendants say, "Yes they did claim this; let them go on with the contract and be paid under it; because we have to have the work done and we claim ultimately that they are not entitled to be paid according to that rate." That is the dispute. On the one side the riveting and bolting was done, and as to this there is no dispute; the plaintiffs discharged their contract. And they charge now, and seek to claim for 20,199 holes at 5 cents each, which comes to the sum of \$1,009.95. The other side, on the contrary, claim that there were only 10,956 holes, that is, they claiming that they were only bound to pay for the holes at the places designated upon the plans and specifications, that is, where there was a rivet or bolt, although the assembled hole, caused by the assembled iron, might have been originally through two or four separate pieces. That leaves a difference between them in this case of 9,243 holes, which at 5 cents a hole comes to \$462.15. I shall, so far as this case is concerned, and for the purposes of this case, direct a verdict for the plaintiffs for such amount as that 20,199 holes at 5 cents will come to, with such additions for extra work and damages as I shall think right; leaving it for the Court above and referring it to them to settle the question as to whether under that contract and under the evidence, the holes should be paid for as the plaintiffs claim, or whether they should be paid for as the defendants claim; the difference being about one-half, 10,000 holes instead of 20,000. That is a question that is a very difficult one. My first impression, I might say, of this contract, was as the plans and specifications are referred to in the contract and became a part of the contract, as the contract says "the holes required, according to the plans and specifications," that would mean only one hole for that aggregate or assembled number of irons, for each rivet or each bolt. But I am not free from doubt as to that. Although it is a very nice question as to the custom or usage which the defendants claim to have proved to exist, I think the evidence of that is very slight; as far as this contract goes, I think it would very largely depend upon the construction to be given to the contract itself; but that will be for the Court above to decide, if they think usage has any relevancy

upon the case in question. This I think they may determine upon the plans and specifications; then it might be called a latent ambiguity, therefore the course of dealings between the parties will be in evidence for the Court to determine as an element between the parties. Now, with the understanding that that question, and that question alone is referred, and the Court's findings on that cannot interfere with any of my findings, except on the principle that the Court may correct any finding in any cause not tried before a jury, what is the construction to be put on the words, "at the rate of five cents a hole?" I refer to the Court to determine in relation to it.

In the meantime, for the purposes of this case, reserving any opinion I may have, I direct a verdict to be entered according to the plaintiffs' contention for 5 cents a hole, with leave reserved to the defendants to move that that verdict be reduced by the sum of \$462.15, which is 5c. per hole for the difference between the number of holes, according to the respective contentions, 9,243 holes, as I make it. That is, a verdict for the plaintiffs against the defendants, for the purposes of this case, for the whole of the 20,199 holes, at 5 cents a hole, \$1,009.95.

The next subject for my consideration, which I deal with and find as to facts, is the question of extra work, in all claimed at \$228.97. Of that I think the plaintiffs are not entitled to recover the whole, for \$211, if I remember correctly, of the items in that, they at one time offered to do for \$137; I think about that sum, leaving out the \$15. If that is so, while that is not conclusive and I do not find it so, for this reason, there was in that other important and quite large works, the cutting of bars at \$1 apiece, which they refused, as they said they could get that done cheaper, or for any reason, they refused to sign the contract for the extras. That being so, I cannot leave out of my mind exactly that the plaintiffs would probably tender for the whole at a less rate than they might if they were tendering only for a part. Therefore, leaving out the \$15, about which there is no dispute, for cutting 47 lace bars, I put that at \$180, and I think that is reasonable, because at the same rate, at \$137, it would be \$147, as near as I make it, at the same proportion, and I think they ought not to be limited to that, and I put that down at \$180, which I find and allow as extras for what was charged here at \$228.97.

Next comes the hoisting of the iron. Now I would think that that part which was not hoisted by the defendants, was substantially heavy hoisting; they did not hoist it, and the plaintiffs would necessarily be delayed in not having it hoisted at the proper time. I think, taking the hoisting of the iron and the delay in consequence of that, I would fix that at \$20. It may be that the hoisting of it would not be more than \$10, but there would be some little delay in not having it ready. Mr. Wilson says there was some little delay, and it was not contradicted, and I must bring my own common sense to bear, and I would think there must necessarily be some delay in getting the iron into place. Perhaps I may be allowed to say that having had practical experience from my early youth, not in this iron work, but in many kinds of practical work in relation to what might go on in reference to buildings of that kind, I have given it my best judgment, and I know there would be. A very important matter is when a contractor is ready to go on with his work, that he should have his material there and be ready to go on with the work, in such position as is reasonably possible under a contract, under the existing circumstances. I am not putting these amounts at fictitious values, I am putting them at what I think is reasonable and right.

Then, moving the scaffolding; I think the plaintiffs would be entitled to have their scaffolding put ready for operation, as the contract says defendants were to find the scaffold and put up staging as may be required. I think, as Mr. McKeown has fairly admitted, that would be worth \$30. Then I think that the delay to the plaintiffs' work, in having themselves to remove the scaffold might be a little. It would not be very much, because I think under the evidence it would be reasonably practicable to make a long staging all along that place, and that practically under the evidence the mode pursued was the best mode of doing it. My own judgment would be that it would be best to have horses, this 15 to 20 feet in height, because if they had five or six in place, they might be placed in position by the defendants themselves, if they had those which these people would not use at one time—they did not use more than 2 or 3 at most; but they could have had staging put up ahead, in advance of the work. Therefore, there would be some little delay, I would think, but I think \$10 is as much as it would be. In all these things it is contemplated you cannot go on every minute, some delays are contemplated and necessary, but I

think \$30 for changing the scaffolding and \$10 for the delay would be enough, because I think \$30 would be as much as it would cost to change the scaffolding there.

Then there is the damage for not having the iron cut ready to bore, especially as the defendants would not positively ask the plaintiffs to do this extra work. I think when the work came there and was not in a position to be bored promptly and immediately, but had to go to the shops and be carried here and there—it is true, they carried it, but where the plaintiffs had to cut and fix it, as they had, beside the delay they had, beside the labour which was done upon it, still there should be some small amount I think allowed; and I do not think this is a contract which would require any excessive amounts. I am trying to be within reason on both sides, with the damage for not having the iron cut, as they were paid for cutting, and it was mechanical work they were prepared reasonably to do, and not including any conveyance of material from place to place, I would think that damage should be placed at about \$25, and I so fix it.

I think those are all the heads Mr. Mullin has claimed on, and all that has occurred to my mind as the case went on, and therefore, as I make those figures, they come to \$1,279.95, including the balance on the doors. Against this has been paid \$875, which leaves a balance of \$404.95, for which I find a verdict at present for the plaintiffs, with leave reserved to the defendants to move the Court to reduce the verdict by \$462.15, if the Court are of opinion that the holes should be paid for as they contend and not individually.

Mr. Mullin—In other words, your Honour, there is no set-off, there would be simply a verdict for the plaintiffs. I would contend that it is necessary that there should not be a verdict entered for them for any balance found due, as there is no evidence of balance due on their set-off.

I contend that if this was an over-payment on account of work which the plaintiffs were doing, there is no way the defendants are entitled to recover that money back, it was paid under a mistake of fact.

The Court—It is not a mistake of fact, it is a mistake of law. That is my view; that I find that this money paid by the defendants, if it was overpaid it was overpaid for the purpose of getting their work done, so as to enable them to carry out their contract, the defendants claiming they were paying too much and the plaintiffs claiming they were pay-

ing too little. If the Court are of the opinion that the defendants are not entitled to recover a balance, but that they have paid the plaintiffs all that they are entitled to recover, then they will enter a verdict for the plaintiffs.

NOVA SCOTIA.

FULL COURT.

JANUARY 26TH, 1907.

WARD v. McKAY.

Will—Construction—"Family" construed to mean "Children"—Devisee Excluded from Specific Benefit held entitled to Share as Member of Class.

Appeal by the defendants from the judgment of WEATHERBE, C.J., argued before TOWNSHEND, J., GRAHAM, E.J., RUSSELL, and LONGLEY, JJ., on the 10th January, 1907.

J. U. Ross, for the appellants.

W. B. A. Ritchie, K.C., for the respondents.

GRAHAM, E.J.:—This is an action for the partition of land. The testator, Andrew Robertson, died leaving a family of six children by his first wife, and one child, Andrew S. W. Robertson, by his second wife, who survives him.

The will is as follows: "In March, 1861, and before entering upon a second marriage, I deceded over my real estate in Town of Pictou (with the reserve of a stable for the benefit of the occupier of this farm) to my four daughters, viz., Eliza Robertson and Mary Robertson, Catherine Robertson (if she come home from Australia). Eliza and Mary each to hold one-third and Catherine and Anne to have the other third equal—Mary is to have control of rents of the property during her lifetime, as I now have, because of her infirmity, thus three of my daughters, Eliza, Mary and Anne Robertson, having gotten and taken a very full division and share of provisions from my house of every description together with over seventy pounds currency paid in outfit and shop fit and Catherine having got an outfit and her passage paid out to Australia, and now likely to be home, places them four

on one level, having got all they are entitled to in and through my death.

“And having espoused Eliza Pirie, relict of John Milton of Pictou, and made her my lawful wife, who in due time brought forth a son whom we named Andrew Simon William, to which son I hereby bequeath, will, deed and make over the whole remainder of my real and personal estate as above specified, investing him with full power as heir-at-law when he becomes of age, appointing his mother as principal executrix and R. P. Grant and Alexander McKay Esquires, in Pictou and Carribou River, to be assistant executors to carry out this deed in full in the spirit and letter hereof, giving them full power to foreclose mortgages and everything competent for them to do after my death, that the executrix may have the use for her own comfort and her own Robertson child or children if she survives me and while she remains my widow, retaining a good moral character, but failing either of these is hereby declared to be denuded of all claim or interest in my subject directly or indirectly, having brought nothing with her so she carries nothing away save her Milton children and a few chattels she then had. After my death and paying all my just and lawful debts with following legacies, viz., to James Robertson my son the sum of ten pounds c’y if he survives me and accepts that sum without giving trouble or annoyance to the survivors; otherwise he is denuded of all, said ten pounds is hereby declared to be in full of all legitim portion executory or anything he can claim in or through my death.

“Susan Robertson my daughter, alias McLeod, with her husband Alexander McLeod, has acted rebels, first against Catherine their sister in Australia and through her against the family, their sin therefore descends from them to their family, they being denuded of all claims in this deed.

“Again my wife brought four of her Milton children with her into my family without any provision for them, and according to contract of marriage between us they are to receive food, raiment and schooling proportional to their standing in society before being adopted into my family if they live and become useful about their mother until sixteen years of age they may be allowed a little remuneration for services but not earlier than sixteen, nor while any of them are getting or have to get more schooling.

“Finally my wife having cheerfully complied with all the conditions and requirements heretofore laid down and should her son Andrew S. W. Robertson and any other or others procreate of our marriage be called away by death before her she is to have the benefit of my subject for herself during her lifetime or widowhood, the remainder to be equally divided among my first family or the survivors of them, always acting most favourably towards the most necessitous.”

All of the children died before the widow. The son, Andrew, died at the age of 14, and before the death of any other of the children. With the exception of two of the children, James and Susan, all died without having had issue. James left surviving him six children and Susan two children. One of testator's children, Anne, had intermarried with the defendant David McKay and left by will to him all of her interest in the testator's property. Susan McCallum, the other defendant, is a daughter of James.

The widow of the testator conveyed all of her interest in the testator's property to Anne McKay.

The first contention raised by the plaintiffs is that the defendant McKay took nothing from his wife's devise—that she was not a survivor. The meaning of two expressions in their context have to be considered, namely “family” and “survivors.”

In the case of *In re Benn*, 29 Ch. D. 344, Cotton, L.J., said: “Now the true rule for construing a will is that if a rule has been laid down fixing in the absence of any expressed intention the meaning of a word, then that meaning is to be given to it unless there is something in the context to vary the meaning, and if no such definite rule has been laid down, then the words are to be taken in their natural sense.”

In *Pigg v. Clarke*, 3 Ch. D. 644, Jessel, M.R., dealing with a case where it was contended that “family” included all descendants of a testator, said: “Now every word which has more than one meaning has a primary meaning, and if it has a primary meaning you want a context to find another. What then is the primary meaning of ‘family’? It is ‘children.’ That is clear upon the authorities which have been cited, and independently of them I should have come to the same conclusion. I hold therefore that the children of the testator can alone take under the words ‘my said family.’”

That was a devise of both real and personal property.

In this case the learned trial Judge held that the testator's "first family or the survivors of them" included his grandchildren. But why stop at grandchildren? This would have resulted from such a construction, that if some of the children of the testator were survivors at the period of distribution they would have been competitors with their own children, as well as the children of deceased children for equal shares. I think that the learned Judge adopted the view that "family" included grandchildren because he thought that any other construction would result in an intestacy and of course that must be leaned against. He says: "I hesitate between the contention of intestacy and the view that testator in speaking of his first family and survivors of them included grandchildren and intended the words in a sense which requires the estate to be equally divided between them individually. I incline to the latter opinion and give judgment accordingly."

But I think that the other construction will not result in an intestacy as the authorities show.

Then if "family" means the children, the expression "survivors" means the survivors of these children, that is, those of the children who survive. It does not cover descendants of course.

I am of opinion that on the death of Andrew the remainder vested in the children of the first family subject to this that if there were survivors at the period of distribution (the death of the life tenant, the widow), then it would be diverted in favor of those survivors. But there being then no survivors there was nothing to divest it, and it remained the property of the representatives of the children. (Reference to *In re Sanders Trusts*, L. R. 1 Eq. 684; *Penny v. Commissioners of Railways*, [1900] A. C. 634; *Sturgess v. Pearson*, 4 Madd. 411; *Wagstaff v. Crosby*, 2 Coll. 746.)

The cases of *Wagstaff v. Crosby* and *In re Sanders Trusts* are cases of contingent gifts like this one and there is no distinction.

Moreover the case of *Wagstaff v. Crosby* is altogether against the contention raised by the defendant that the survivor of the children, although not surviving the period of distribution, would take the whole remainder.

If these positions are correct the property belongs to the children of the first family in equal shares and must be distributed accordingly, the defendant McKay being entitled

under the will of his wife to her share as one of the six children and what she inherited before her death as an heir of her other sisters.

The defendant raises a contention, namely, that Susan, a member of the family, is barred by an express exception in the will. It will be seen by reading the whole will that the testator for reasons mentioned in the books had a notion quite common, viz., that he ought to mention those members of his family on whom he was not conferring any of his bounty and give reasons for his course. He first mentions four of his daughters, Eliza, Mary, Anne and Catherine, and shows how they already had been benefited (outside of the will), and he speaks of them as "having got all they are entitled to in and through my death."

Now these four with these words against them are not thereby excepted from taking as members of the family upon the contingency of Andrew's death.

Then he comes to his son James, who according to the popular notion may attack the will unless he is mentioned and a reason given for his not receiving a substantial share in the estate. He is to have ten pounds if he accepts it and makes no attack on the will. Otherwise he is denuded of all. Said £10 is to be in full of "all legitim portion executory or anything he can claim in or through my death."

Neither does this expression exclude James from this interest.

Coming to the remaining child, Susan, of the first family, he gives another reason for her case, viz., that she and her husband have acted badly towards Catherine, and that is the reason why he is making no special provision for her in the will, or at least their family, they (as it appears by the will) being "denuded of all claims in this deed."

I think he had not in mind, when he was making these explanations, the provision made for all six in case of that contingency happening; and that in the case of Susan there is no actual barring or excepting her from any interest she would take with the others upon a contingency which seemed no doubt remote, any more than in the case of the other four daughters, but that it is a mere explanation of a past transaction, namely, his reason for not making any special provision for her.

The order for partition will be varied accordingly.

The appeal of the defendant, David McKay, will be allowed and he will have his costs of appeal and of the contestation below paid out of the estate. Alexander McLeod and Andrew McLeod, sons of Susan, will have their costs of appeal paid out of the estate. The others will bear their costs of the appeal.

RUSSELL, and LONGLEY, J.J., concurred.

TOWNSHEND, J., read an opinion reaching the same conclusion.

NOVA SCOTIA.

MEAGHER, J.

JANUARY 4TH. 1907.

DONNELLY v. VROOM.

Fishery—Shell Fish—Clams—Natural Beds in Tidal Waters between High Water Mark and Low Water Mark—Private Ownership of Soil—Public Right to Take Shell Fish.

Trial of action.

W. E. Roscoe, K.C., and F. Jones, for plaintiff.

J. J. Ritchie, K.C., for defendants.

MEAGHER, J.:—The plaintiff claims damages for the conversion of a dory and its oars and some clams.

The defendants deny the alleged wrongful acts, the plaintiff's property and possession, and all material averments in the statement of claim. Alternatively the sum of \$10 was paid into Court in respect to the dory and oars. The value of these with the painter did not exceed seven dollars. Their conversion was not, I thought, seriously contested.

The defendants counterclaimed for the clams which, they averred, were dug out of the flats in question, of which they were owners and in possession down to low water mark. They also claimed that, being the owners and in possession of the flats, they therefore had the sole and exclusive right to dig clams thereon. In the alternative, that they and their predecessors in title in the flats had for more than sixty years

before action enjoyed as of right, and without interruption, the sole and exclusive right to dig clams upon said flats between high and low water mark. There is also a claim in trespass for breaking and entering their close, digging up the soil, etc.

The reply to the counterclaim denies all material averments in it. The material part of the reply is that the flats in question were and are part of an arm of the sea called Annapolis Basin, which was and is a common and public and navigable arm of the sea in which the tides and waters of the sea flow and reflow, and therefore all the King's subjects had and have a right to fish therein and to carry away the fish taken, and the plaintiff, a British subject, in the exercise of such right, did on or about the 30th of August, 1904, and at other times, fish for and dig clams on said flats between high and low water mark and carry a quantity of them away, doing no injury to the soil of said flats and remaining no longer than was necessary for the purpose aforesaid.

The locus is, as alleged in the above reply, part of the Annapolis Basin and an arm of the sea, and the tides of the sea flow and reflow there. The flats spoken of are in front of the defendants' farm and were included, down to low water mark, in the grant from the Crown to one of their predecessors in title, which also professed to grant the right of fishery. The flats and the farm were embraced in the same grant, which was issued over seventy years ago. Ever since then the grantee and those claiming under him, including the defendants, have been in possession of the granted area. Their possession of the flats, however, was for the most part constructive rather than actual, owing to the tides which covered them twice every twenty-four hours. During a great many years, however, of that period each owner respectively had actual possession of a portion of the flats by means of fish weirs erected and used thereon from year to year. It has not been shown whether or not the weirs so erected or any of them ever covered the place where the plaintiff dug the clams. The distance between high and low water mark on the flats is apparently in the neighbourhood of three hundred yards or more. The clams were dug by the plaintiff about two hundred feet from low water mark, and from there to the line of ordinary high tides is upwards of three hundred feet. In an average tide there is 20 to 30 feet of water, when the tide is in, at the 200 feet line mentioned.

The digging and removal of the clams does practically no injury to the soil, because the next tide carries with it material which fills up the excavation made in digging for them. There is evidence that a great many who dug clams on the flats during the last sixty years or so, sought permission from the defendants' father, during his occupation, and from the defendants since then, but I am unable to find as a fact that they, respectively, during their several tenures, had and enjoyed the exclusive right to dig there for them as of right and without interruption. Occasionally at any rate—perhaps it might be said frequently—parties dug clams on the flats without any permission and without seeking any from the then owner of the flats. It is not easy to discriminate whether when permission was sought it was intended to cover going through their lands outside of the flats as well as digging clams, or was confined to the latter alone. In the most part the permission I believe was sought in respect to the gathering of the clams. Those who went on the flats from the land side could only get to them through the defendants' farm.

It appears to me that when the defendants dug clams on the flats they did so merely in the exercise of a right which belonged to them in common with all other members of the public. In order to create the presumption of a grant of an exclusive right, it is necessary to show that all others have been kept out by the party asserting such grant and by those under whom he claims; such at least appears to be a fair conclusion from the authorities I have examined. The evidence in this case is not sufficient to bring it within the rule just mentioned.

In the view I am compelled to take of the law, the question of ownership of the soil, as well as possession thereof and user with or without leave, seems to me to be immaterial.

While the grant professes to convey a right of fishing it was not described to be in severalty. But if it were so described it would be invalid against other subjects whatever its force may have been as against the Crown.

Coulson & Forbes in their work on the Law of Waters, edition of 1902, page 350, say: "Although, *prima facie*, every subject is entitled to fish in the sea and tidal waters yet, prior to Magna Charta, the Crown could, by its prerogative, exclude the public from such *prima facie* right and grant the exclusive right of fishery to a private individual either to-

gether with or distinct from the soil. The Great Charter restrained this prerogative for the future, but left untouched all fisheries which were made several to the exclusion of the public by act of the Crown not later than the reign of Henry II. When, therefore, an individual claims a several fishery in the sea or tidal waters, he must prove his right to it either by express grant from the Crown prior to Magna Charta, or by presumption from which such right will be presumed. In all cases the presumption is against the claimant and he must establish affirmatively his exclusive right."

Where he can prove an express grant or charter from the Crown his right is without question. Where the claim is by prescription the effect of the evidence and the nature and extent required is pointed out by Willes, J., in *Malcomson v. O'Dea*, 10 H. L. C. 593, in the following passage: "If evidence be given of long enjoyment of a fishery to the exclusion of others of such a character as to establish that it has been dealt with as of right as a distinct and separate property, and that there is nothing to show that its origin was modern, the result is not that you say this is usurpation, for it is not traced back to Henry II., but that you presume that the fishery being reasonably shewn to have been dealt with as property must have become such in due course of law and therefore must have been created before legal memory."

Two of the elements referred to in the above are absent here:

1. There is no proof to show a user or a dealing with the right of fishery of clams upon the flats to the exclusion of others as a right of property separate and distinct in itself.

2. There is something to show that its origin was modern.

Taking into consideration the comparatively recent settlement of this province, in relation to the time when the Great Charter was obtained, it is impossible to make a finding such as that indicated to be necessary in the opinion of Willes, J., above quoted.

Ordinarily, a grant may be presumed in many cases, though within time of legal memory, and no record can be shown, but it cannot be in this instance because there could not be a legal commencement by grant in this country, at least of a several fishery, even though the contrary may be true of England.

Willes, J., in the case last mentioned, said "that the Great Charter left untouched all fisheries which were made several to the exclusion of the public by act of the Crown not later than the reign of Henry II."

The fact thus adverted to afforded scope for the presumption in England in cases where there was a long continued exclusive enjoyment, that the right so exercised had a legal origin.

Lord O'Hagan in *Neill v. Duke of Devonshire*, 8 App. Cas. 158, said: "This matter is clear and it is equally so that a subject may have a right of fishery in a tidal river either by a grant from the Crown or by prescription. But unless a several fishery in tidal waters was in being before Magna Charta it cannot be created by subsequent grant. If it was previously appropriated by the Crown or by a private person, or in technical language 'put in defence,' there may be an effectual grant of it."

See, also, per Lord Blackburn, at page 180, to the same effect, quoting the Irish Master of the Rolls in that case.

It is in my opinion idle to speak in this province in the light of its history, and in relation to the time of the Great Charter, in comparison with the arrival of the earliest settlers, of an appropriation of a several fishery in tidal waters by the Crown or by a private person so as to admit of an effectual grant thereof by the Crown in accordance with Magna Charta, and therefore that aspect may be set aside so far as this case is concerned.

Meisner's Case, 3 N. S. R. 97, decides that the Crown cannot grant the waters of a navigable arm of the sea so as to give a right of exclusive fishing therein. The grant in that case was made in 1799. Hill, J., who spoke for the Court, at p. 99, in answer to the contention that under the grant and title the plaintiff was entitled to a fishery in the locus, said:

"Now first the Crown could not grant a general fishery. A grant to support that must be as old as the reign of Henry II., and therefore beyond the time of legal memory; for by Magna Charta and the 2nd and 3rd Charters of Henry III. the King is expressly excluded from making fresh grants."

Dealing with the question relied on by the plaintiff, namely, an uninterrupted, exclusive, use, possession and enjoyment of the locus, Deep Cove, for upwards of twenty years before the action, the learned Judge said: "Now supposing the

arm of the sea capable of being so possessed, this is the first time I ever heard that twenty years' possession of an arm of the sea would give a party a right of general fishery thereon. A prescriptive right to a general fishery in a navigable river may certainly exist, but where to find that twenty years' possession is evidence of that prescriptive right I know not."

There does not appear to be any distinction, so far as the question of right is involved, between taking swimming fish and shell fish covered by the soil. The right of the public to fish on the sea shore between high and low water mark includes the right to take shell fish: see Coulson & Forbes, p. 43, and cases cited.

The American cases are clear and specific on the point: see especially Packard v. Ryder, 144 Mass. 440. The case of Foster v. Warblington Urban Council, 75 L. J. K. B., which was in some respects relied on by both parties, does not appear to me to have any material application. The oysters in that case were procured by the plaintiff and planted in aid of a commercial adventure in specially prepared storage beds situate on the foreshore which was owned by the lord of the manor. The beds prepared by the plaintiff had existed and were in use upwards of twenty years. They were therefore the plaintiff's property. The clams in this instance came in a natural way and although embedded in the defendants' soil were not their property. Moreover the interference with the oysters was not due to the exercise of any public right such as navigation or fishing, to which the ownership of oysters and oyster beds cannot properly be held to be subject, but to a right claimed to discharge sewage, which at least one member of the court held was not a common law right at all.

In Gunn v. Free Fishers of Whitstable, 11 H. L. C. 192, it was held that the grantee of an oyster bed in an arm of the sea below low water mark held it subject to the right of navigation. Equally so, I think, must the grantee of part of the foreshore hold it subject to the right of fishing on the part of the public. The right of navigation as well as that of fishing is paramount to the right of a mere owner of the soil. In other words the public right of navigation and fishing is not and cannot be affected or diminished by any transfer of the soil of an arm of the sea or its shores to an individual.

I am therefore of opinion that the plaintiff, as one of the public, had a right to go on the flats and dig clams and

take them away, and if in the exercise of that right, and to which defendants' rights as owners of the soil were subject, he dug up the soil in places for the purpose of securing clams he did only what he was lawfully entitled to do, and is not therefore liable in trespass for entering the flats, nor in trover for carrying away the clams so obtained.

There is no question of excess. None was pleaded or urged. Both parties acted under an honest belief of right.

I assess the value of the clams taken by the defendants at the sum of \$2. The question of costs will be determined when the order upon the foregoing is moved.

NEW BRUNSWICK.

FULL COURT.

FEBRUARY 10TH, 1906.

EX PARTE COUNTY OF YORK; IN RE YORK LOCAL BOARD OF HEALTH.

Municipal Corporations—Public Health—Refusal of Council to Pay Expenses of Local Board of Health—Application of Chairman for Order for Payment—Previous Authority of Board Essential—Public Health Act, C. S. 1903 c. 53, ss. 72, 73.

Application in Michaelmas Term, 1905, before TUCK, C.J., HANINGTON, McLEOD, and GREGORY, JJ., to rescind an order made by Tuck, C.J., directing the treasurer of the county of York to pay to the local board of health for the county of York, district No. 3, the sum of \$300, voted by the council of the county of York, under presentation to the council, under s. 72 of the Public Health Act (C. S. 1903 c. 53), by the chairman of the local board, of an estimate duly approved by the secretary of the provincial board. The application to Tuck, C.J., was made by the chairman of the local board under s. 73 of the Act; but not with the authority of the board. The ground of the motion to rescind was that the chairman had no right to apply for the order unless authorized by a resolution of the board.

F. St. J. Bliss, in support of the motion to rescind, cited *Robertson v. Durham School Trustees*, 34 N. B. R. 103.

R. W. McLellan, contra.

TUCK, C.J.:—This is an application to rescind my order directing the treasurer of the county of York to pay the local board of health the amount properly estimated under the Public Health Act (C. S. 1903, c .53), for their expenses incurred to a day named and for future expenses for the succeeding six months. I found as a matter of fact that the charges in the account for the expenses incurred were reasonable and should have been paid. I think the chairman had the right to make the application under the Act, and that the motion to rescind the order should be refused; but the other members of the Court taking part in the judgment are of a different opinion.

HANINGTON, J.:—I think the application should be granted. The estimate of the board came before the council and they voted the amount asked for, but refused to pay the full amount that was asked for expenses incurred. Upon this being brought to the attention of the chairman of the board he without having consulted or brought the matter before the board applied to the Chief Justice for an order for payment. I think the Act does not authorize him to make such an application without first obtaining the authority of the board. It is not sufficient that the members of the board or some of them consent. They must act as a board and not as individuals, and the authority to make the application must be the authority of the board as such.

MCLEOD, J., agreed with HANINGTON, J.

GREGORY, J., took no part.

NOVA SCOTIA.

FULL COURT.

JANUARY 26TH, 1907.

IN RE CAMERON.

*Justices' Court—Summons for Service in Another County—
Failure to Endorse Amount of Deposit for Travelling Ex-
penses—Waiver.*

Appeal from order of RUSSELL, J., refusing a writ of certiorari argued before WEATHERBE, C.J., TOWNSHEND, J., GRAHAM, E.J., and MEAGHER, J., on the 3rd December, 1906.

J. J. Power, and R. G. McKay, for appellant.

E. C. Gregory, K.C., and E. L. Gerrow, for respondent.

WEATHERBE, C.J.:—Where a defendant resides out of the county, in an action against him before a justice, the plaintiff shall deposit with the justice ten cents per mile for the distance between the place of trial and defendant's residence. It is enacted in terms, "If the same is not actually paid and endorsed on the writ, such writ and the service thereof shall be void." This sum, as is expressed in the Act, is for the defendant's "personal expenses in attending upon the trial."

The sum was not endorsed on the writ and the defendant neglected to attend at the trial, on the 6th March, yet judgment was entered against him.

Two grounds were taken at the argument. One was that the defendant could not have ignored the void summons—that the neglect to endorse it was not fatal. Another was that Cameron had appeared by filing "some sort of a defensive statement."

The paper relied on to shew this "appearance" of Cameron, was not signed by the defendant, nor is there any evidence whatever that Cameron in any way, directly or indirectly, gave any authority to sign, present, or file, the paper relied on, nor that he even knew of the existence of such a paper.

Defendant Cameron has himself in these proceedings made an affidavit denying that he ever gave authority to sign the paper in question or knew anything of it.

Even if it were possible to waive such a defect as, under an express statute, rendered the summons and service void, it is admitted the burden was on plaintiff to make this apparent and thereby revive them.

On motion for certiorari to remove the proceedings because of—among other grounds—the want of this endorsement which would have afforded notice of the deposit, it appeared by two affidavits of the justices that Cameron had filed some documents in the case.

This fact appears three times explicitly stated by Kirk. First, he swears to a copy of "set-off or defence filed by the said Thomas Cameron." Then he says, said "set-off or defence was filed by the said Thomas Cameron on or about the first of March within the time for filing a set-off." At this time reliance seemed to have been placed on shewing that

the paper was one which might be held (being a legal step in the cause) a waiver of the defect which made void the summons.

Then in Kirk's second affidavit—made later on—he verified the original “defence or appearance filed by the said Thomas A. Cameron.” By this time it might seem to have occurred that the paper was not a set-off, and that what the law required to reach the standard of a waiver of a void summons was an “appearance.” And possibly therefore the trial justice is required to swear to the essential thing. This was not required within the time for filing a set-off, so that is omitted.

Another defect relied on to get a certiorari was the want of mention of the place of return.

The motion was refused because: 1st, Cameron had filed a statement which was a waiver of the first defect, and 2nd, the filing by Cameron of the statement at Kirk's disclosed defendant's knowledge of the place of return.

An appeal was taken from the refusal of the application of certiorari to this Court, and on the argument before us affidavits of the defendant Cameron and his solicitor were read.

Cameron explicitly denies filing the alleged paper or ever having seen or signed it, or in any manner authorized it.

It is obvious if his solicitor had merely made an affidavit denying the affidavits of Kirk as to the filing by Cameron, a statement literally true, there would have been a direct conflict on the one point.

I do not understand plaintiff's counsel wishes an opportunity to shew that Cameron himself filed the paper, or to contradict any of the new matter produced before us. If so, he should have an opportunity to do so which would end the matter if Cameron is contradicted in any way.

But Cameron's affidavit did not stop at denying that he filed the alleged defence. His solicitor had become aware of a rumour—a mere rumour—that some sort of paper not signed or authorized by Cameron had been sent to Kirk.

If he had suppressed this rumour when drawing Cameron's affidavit he would have been repeating the mistake made in the omission of the fact from the affidavits of Kirk that Campbell himself had filed the paper.

Therefore Cameron's affidavit read to us did not stop at a denial of his signing or authorizing any appearance or defence, and the fact is set out which suggests the probable origin of the paper. A justice, James MacKay, who had sworn the affidavit of service of the summons on defendant, had previous to the trial before Kirk volunteered to file a set-off for Cameron, when as Cameron now swears, he told MacKay he was not going to file any set-off and instructed him not to do so. Some time afterwards he heard that a document had been sent by mail by MacKay to Kirk. He adds: "If such was sent, it was sent in by the said James MacKay, as above set out, and without my knowledge or privity and against my instructions."

In May, and after the papers were prepared by the solicitor for certiorari, Cameron communicated this rumour to the solicitor, of a document being sent under the above circumstances to the justices.

It is useful to enquire how the solicitor, Mr. R. MacKay, should have treated this matter, before Mr. Justice Russell. We know it is unusual to have a client present at such a juncture. No solicitor would have anticipated the result by an affidavit of a rumour which would certainly have been useless. Possibly he may have asked for time. We are not aware what took place. I have asked the learned Judge, but he has no recollection. There is nothing to shew, I think, that anything was suppressed or that the defendant should suffer by anything like silence when there may have been protest and remonstrance which would have been possibly out of place.

Time for further enquiry and advice of counsel as to an appeal was the wisest course, assuming that Cameron was honest and for that matter assuming the justice was merely labouring, as I suppose he may have been, under an impression the disputed paper was from defendant.

Taking the material before us, can we say that Cameron himself signed and filed the paper? Literally if we entirely disbelieve Cameron, we may so interpret Kirk's affidavits, but I think it was admitted at the argument he received the paper by mail.

Can we, without any evidence from James MacKay, say that Cameron is guilty of a false statement? We have no evidence that MacKay sent the paper he was instructed not

to send, and while Cameron's sworn statement may be all true, James MacKay may have misunderstood him.

Plaintiff's contention is that Cameron is estopped from setting up the void summons and service on account of his having filed an appearance. It would be a curious quirk of the law if when he shews that in point of fact he neither filed nor intended to file an appearance, or in any way waive his right, he should find himself estopped because he did not anticipate the affidavits of Kirk in shewing cause by affidavits of a rumour he heard that some sort of a document had been sent to the magistrate. I think the solicitor, Mr. R. MacKay, was correct in May in advising delay on learning the rumour from his client that some one against the remonstrance of his client had appeared in the case.

It would be remarkable if the solicitor, MacKay, was not justified in believing that Kirk, the trial justice, would not be likely to appear to shew cause against the motion for certiorari by pledging his oath that Cameron had filed an appearance, much less that James MacKay by Cameron's authority had done so.

From the rumour that the solicitor had from his client all he could have anticipated, was that James MacKay and no one else could have sworn an affidavit to successfully resist his motion.

And is it not therefore obvious that the solicitor came properly armed and was clearly taken by surprise by the use, in shewing cause, of affidavits which could not truthfully be drawn by any solicitor with a knowledge of the facts.

If Kirk had told his solicitor that all that he knew of the "set-off or defence," or "defence and appearance," was that he, Kirk, received it by mail, and could not swear to the handwriting, Kirk's affidavits would never have been made without involving the solicitor.

It is in this light clearly obvious that the suppression of the real facts on the part of the trial justice first led to the difficulty which now arises.

It may be that James MacKay should have been called on to furnish evidence, but it is hard to say that either party should be held at fault in not applying to him.

Then if we take the paper sent by James MacKay to have been authorized by Cameron, by treating Cameron's statement as false, or an error, can that paper be regarded as anything more than a letter to the justice protesting that Cameron owed nothing.

“ East River, St. Marys, Feb. 26, 1906.

“To David Kirk, J.P.: My set-off in the case now pending between I and Thomas MacKeen is that I do not owe the said Thomas MacKeen anything.

“ Thomas Cameron.”

Can this be regarded as denoting an intention on the part of Cameron to abandon his right to treat the summons and service as void? Would a letter to the justice denying that he owed anything be made more than a protest in a Court where no pleadings are provided for.

It is because logically I can find nothing that can be treated as a precedent in this Court to revive a proceeding declared void by statute that I cannot refuse the appeal.

TOWNSHEND, J.:—This is an appeal from the refusal of Russell, J., to allow a writ of certiorari to bring up the record of judgment of two justices of the peace, against the applicant, Thomas A. Cameron. Cameron resided in the county of Pictou. Thomas MacKeen, the plaintiff, resided in the county of Guysborough, and the two justices were justices for the latter county. The summons was made returnable at Aspen in the same county, where the trial was to take place.

By R. S. c. 160, s. 5, it is provided: “When the defendant does not reside in the county in which the writ of summons is issued the plaintiff shall before such writ is issued deposit with the justice issuing the same, a sum equal to ten cents per mile of the distance between the residence of the defendants and the place of trial.” Sub-section 2: “The amount of such deposit shall be indorsed on the writ of summons and copy, and if the same is not actually paid, and so indorsed, such writ, and the service thereof, shall be void.”

In this case the indorsement on the writ was, “I hereby certify that the money is deposited with me to pay the travelling fees of defendant to place of trial.”

The defendant did not attend the trial, and judgment was given against him. Was this indorsement a compliance with the statute? I am of opinion clearly that it was not, and that the summons and service were void, as well as the judgment thereon. The statute makes it imperative that the amount paid should be indorsed, for the purpose I presume of enabling the defendant to know whether it was sufficient. By sub-s. 4 (b) this deposit is to be paid to the defendant for his personal expenses in attending upon the trial if the plaintiff discontinues or if judgment is given in his favour. Defendant therefore has a special interest in knowing whether the proper sum has been deposited to meet such expenses. On the part of plaintiff it was contended that inasmuch as a set-off or plea had been filed with the justice it amounted to a waiver of the indorsement. The defendant has sworn that this plea or set-off was filed without his authority. Whether this be so or not, I think it of no consequence. The statute says that unless "the amount of such deposit" is indorsed the writ and service shall be void. There can be no waiver of this requirement. Another point was taken by plaintiff's counsel that applicant had not complied with the Crown rule requiring a copy of the record in the Court below, to be annexed to his affidavit, or perhaps more appropriately that a correct record was not attached inasmuch as it does not shew that two justices signed the judgment. I think the record is as complete as it could well be. David Kirk, the magistrate who issued the summons, signs the certificate and says, "I certify that the foregoing is a true abstract of the record of the judgment entered in the above cause against the above named Thomas A. Cameron, on the 6th day of March, A.D. 1906, by me the undersigned, and Wellington Sutherland, J.P., in and for the county of Guysborough, at Aspen, in said county."

Record in the sense usually understood there could not be, as the justices court is not a court of record, but the certificate exactly complies with the provision of s. 36, which states the document necessary to be sent to the court on appeal, and is to all intents a copy of the record kept by the acting justice. The defendant made some other points not material to be discussed as these dealt with are, in my opinion, amply sufficient to justify the allowance of the writ of certiorari, and as I presume the plaintiff will not wish to incur further expense by another motion to quash, no objection will be made

to quashing the judgment below on the return of the writ. The defendant's appeal should be allowed with costs.

GRAHAM, E.J.:—This application for a writ of certiorari was made to Russell, J., at the June sittings, at Pictou, 1906.

The summons for a debt in the justices' court which was for service in another county, had not indorsed upon it the amount of the fees required for the defendant's travelling expenses. This was the indorsement: "I hereby certify that the money is deposited with me to pay the travelling fees of defendant to place of trial," but the magistrate had not stated the amount although a sufficient sum had been deposited with him. This is the principal defect; there are others.

There had, however, been filed with the justices a defence. The affidavit of the justices proves the filing.

I think that this would constitute a waiver of these defects, notwithstanding the statute provides that for want of the indorsement the summons and service should be void.

There are many matters which cannot be taken advantage of. If a writ of summons is void for want of a seal, it is clear that the defendant after issue joined, cannot avail himself of that defect. That stage of the case is past: 3 Chitty Gen. Practice, 525.

But after the learned Judge had decided the case, dismissing the application which he did on the 26th of June, 1906, and after the notice of appeal, 11th September, 1906, the defendant's solicitor proposes to read on the appeal before us two affidavits of 6th and 8th November, 1906, setting forth that this defence was filed without the defendant's authority; and that although the defendant's solicitor knew of its existence in the month before that in which the application came on before Russell, J., and apparently the defendant knew of it before that.

In this affidavit the solicitor states: "I say that it was some time in the month of May, 1906, and after I had my papers prepared for the certiorari application herein, that I learned that the said alleged set-off was sent in under the circumstances set out in the affidavit of Thomas A. Cameron, sworn herein the 6th day of November, A.D. 1906."

This is the principal paragraph as to those circumstances, in the defenlant's affidavit: "3. As to paragraphs 4 and 5 of the said affidavit of David Kirk, sworn herein the said 9th day of June, and as to paragraph 4 of the said affidavit of David Kirk, sworn herein the said 21st day of June, I say that I never at any time filed with the said David Kirk or with anyone a set-off or defence or appearance or any document or paper whatever, as alleged in the said paragraphs of the said affidavits. Shortly after I was served with the justices' summons herein, and while I was working away from home, as set out in my previous affidavit, James McKay, the justice who took the affidavit of service on me of the said justices' summons, spoke to me about filing a set-off and said that he would file a set-off for me. I told him that I was not going to file a set-off and instructed him not to do so. Some time afterwards I learned that the said James McKay sent by mail to the said David Kirk, a document which I believe is the so-called set-off referred to in the said affidavits of the said David Kirk. I say that I never saw the said so-called set-off, and if such was sent in it was sent in by the said James MacKay as above set out and without my knowledge of privity and against my instructions."

It appears that if the application for a writ of certiorari is an interlocutory one, further evidence may be given without special leave.

But the defendant who made an affidavit and who knew of the filing of the defence before the application came on is late in putting forward the version that it was filed by a volunteer without his leave.

After he has risked silence on that subject before Russell, J., I think he ought not to complain if his account of the matter is not taken here. The appeal will be dismissed and the application will be discharged.

MEAGHER, J., concurred with GRAHAM. E.J.

The Court being equally divided, the appeal was dismissed without costs.

NOVA SCOTIA.

FULL COURT.

JANUARY 26TH, 1907.

FRASER v. WALTERS.

Costs—Depriving Successful Party of Costs—Illegal Intention.

Appeal from the order of RUSSELL, J., depriving plaintiff of costs, argued before TOWNSHEND, J., GRAHAM, E.J., and LONGLEY, J., on the 10th of January, 1907.

John U. Ross, and J. J. Power, for appellant.

W. F. O'Connor, and H. S. McKay, for respondent.

GRAHAM, E.J.:—The defendants on the 30th April, 1906, with a search warrant against one Sutherland, under the Canada Temperance Act, seized in a locked room at the Dufferin hotel, at Westville, of which he was proprietor, the following liquors: "10 bottles whiskey, 20 flasks whiskey, 40 flasks rum, 1 case gin, 10 jugs gin, 17 cases rum, 4 cases whiskey, 2 barrels wine, half barrel of beer."

The plaintiff replevied the goods. The plaintiff and Sutherland testified on the trial that on the 17th April, 1906, Sutherland had sold to Fraser liquors worth \$260, for \$115, of which \$55 was there paid in money and the balance was a former account for making hay, hauling it, and for other trucking.

Sutherland it appeared had shortly before been fined under that Act, for keeping liquors for sale. The liquors were, as I have indicated, still upon the premises.

The learned trial Judge found in favour of the plaintiff. because he felt obliged to accept the testimony of these two witnesses, there being no testimony to the contrary, that the goods had passed to the plaintiff.

But he deprived the plaintiff of costs, and he assigned as a reason that he inferred that the liquors were meant to be used and were more or less used in violation of the Canada Temperance Act.

This while a finding of illegality, was not a finding at variance with the finding that the goods belonged to the defendant.

In my opinion, the illegal purpose in this case was as relevant on the question of costs as the fraudulent purpose was in *Jenkins v. MacAdam*, 38 N. S. R. 124, where a plaintiff, although successful in that action in recovering a boat, was deprived of costs because, in order to defeat an anticipated execution against himself, he had previously put forward his wife to bring an action to recover the same boat as her property, when it was not her property.

I see no reason for interfering with this exercise of discretion by the Judge.

LONGLEY, J., read an opinion reaching the same conclusion.

TOWNSHEND, J., dissented on the ground that the trial Judge having felt compelled to accept plaintiff's testimony as true, and having no evidence before him to warrant him in deciding adversely to him, was bound to give him his full legal rights.

NOVA SCOTIA.

FULL COURT.

JANUARY 26TH, 1907.

SAWLER v. MUNICIPALITY OF CHESTER.

Costs—Successful Defendant Ordered to Pay Costs—Expropriation—Arbitration and Award.

Appeal by defendants as to costs in an action claiming compensation for land taken for railway purposes, and in the alternative a mandamus to compel defendants to appoint an arbitrator, argued before TOWNSHEND, J., GRAHAM, E.J., RUSSELL, and LONGLEY, JJ.

Jas. A. McLean, K.C., for appellants.

A. Roberts, for respondent.

The judgment of the Court was delivered by GRAHAM, E.J.: Under the Act respecting the Halifax and South Western Railway Company, Acts of 1902, c. 1, ss. 21, 22, the municipality of Chester assumed the land damages for land taken by the company in that district. Under s. 23 the

damages were to be appraised by three arbitrators, one to be chosen by all the proprietors at a meeting to be called under special provision; one by the municipal council, and the third was to be chosen by the two so appointed.

These arbitrators were appointed but omitted to appraise the plaintiff's damages. It appears that while part of the land at least had been expropriated by the filing of the plan as pointed out in s. 22, the name of the plaintiff was not mentioned on the plan. Then a second plan was filed taking additional land. This was on January 7th, 1904, and the general award was made February 15th, 1904; and the plaintiff was not mentioned. The plaintiff was then placed in this position: Either she could not have the land damages payable by the municipality appraised at all under that Act, or else they could be appraised by the arbitrators already appointed. The learned Judge adopted the latter view. The plaintiff however took this course: On the 13th April, 1905, she notified the municipality that she had appointed another person altogether as her arbitrator, called on the municipal council to appoint an arbitrator to act on its behalf, and proposed that the two so appointed should appoint a third.

Then the plaintiff brought this action for a mandamus against the municipality and claimed the same thing in the prayer, that is to say: "The plaintiff claims: 1. \$200 as compensation for the said taking of said lands and the damages arising therefrom.

"2. In the alternative, a mandamus ordering and requiring the defendant by its municipal council to choose and appoint an arbitrator as required by and in accordance with and under the provisions of said s. 23 of said charter as its arbitrator, for the purpose of having such compensation appraised and fixed by three arbitrators under the provisions of said s. 23 of said charter.

"3. Such further and other relief as the nature of the case may require."

The case came on for trial and the learned Judge gave a judgment dealing with the difficulties and suggesting a certain course.

The defendant municipality was entitled to have the action against it dismissed.

The plaintiff then gave notice of motion for a judgment, or in the alternative for an amendment by adding the arbi-

trators already appointed as defendants, and asking a mandamus against them to compel them to appraise the damages. It appeared that the arbitrators had never been requested by the plaintiff to appraise the damages.

However the learned Judge made this order on that application: "Upon reading the notice of motion herein dated the 10th day of March, 1906, and the affidavit of service thereof of Charles E. Williams sworn the 13th day of March, 1906, and after hearing Mr. Roberts, counsel on behalf of the plaintiff, and Mr. J. A. McLean, K.C., counsel on behalf of the defendant, and of Hiram Hennigar, James Redden and Henry A. Hiltz, and upon Mr. McLean waiving all objections to or on account of said Hiram Hennigar, James Redden and Henry A. Hiltz never having refused to proceed, and upon Mr. McLean undertaking that the said Hiram Hennigar, James Redden and Henry A. Hiltz will comply with this order, and upon motion of Mr. Roberts on behalf of plaintiff, and Mr. McLean on behalf of defendant, and on behalf of said Hiram Hennigar, James Redden and Henry A. Hiltz, consenting thereto:

It is ordered that the said Hiram Hennigar, James Redden and Henry A. Hiltz as arbitrators duly appointed under and in accordance with the provisions of s. 23 of c. 2 of the Statutes of Nova Scotia for the year 1902, do and they are hereby ordained forthwith to appraise and fix the amount of the compensation to be paid to the plaintiff by the defendant, for and on account of the taking of the lands of the plaintiff described in the statement of claim herein, by the Halifax and South Western Railway Company, as mentioned and described in said statement of claim, and the amount of the damages arising therefrom as provided by and in accordance with said s. 23 of c. 2 of said Statutes of Nova Scotia, 1902; the said lands of plaintiff being bounded and described as follows, viz.: . . .

And be it further ordered that there be no costs of this application and order to either party or any person.

Reserving to Mr. McLean the right to object that the plaintiff is not entitled to any costs in this action.

And reserving further consideration and directions in and of all other matters in this action not disposed of and settled by this order, and that plaintiff shall be at liberty at any time to apply for such further consideration and directions.

Dated at Bridgewater, N.S., this 17th day of March, 1906."

There was of course no further resistance and the damages were forthwith appraised, i.e., within ten days after the date of the order.

The learned trial Judge then, after notice, made an order disposing of the costs, viz., that the municipality should pay to the plaintiff the costs of action and trial, except upon the order to amend.

And there is an appeal from that disposition of the costs.

At no time was the defendant municipality, either before or after the amendment, liable in this action. It was always entitled to have it dismissed as against it—dismissed altogether in fact—for the arbitrators were never made parties—and in the ordinary course with costs.

The learned Judge could, in his discretion, deprive it of costs by reason of its conduct as set forth in his final judgment—that of April 20th, 1906, but he could not make it pay costs to the plaintiff.

The appeal will be allowed with costs, except the costs of twenty pages of the printed case, both printer's and solicitor's; and the order as to costs discharged and set aside and a provision substituted that the plaintiff shall have no costs.

NOVA SCOTIA.

FULL COURT.

JANUARY 26TH, 1907.

ROCKWELL v. TOWN OF BRIDGEWATER.

*Highways — Sidewalk — Negligence—Want of Drainage—
Formation of Ice.*

Application by plaintiff for a new trial in an action claiming damages for injuries sustained by plaintiff owing to alleged negligence in connection with the construction and repair of a sidewalk, argued before TOWNSHEND, J., GRAHAM, E.J., and RUSSELL, J., on the 14th January, 1907.

Jas. A. McLean, K.C., for appellant.

A. Roberts, for respondents.

The judgment of the Court was delivered by TOWNSEND, J.:—In this action the plaintiff has sued the town of Bridgewater for injuries suffered as he alleges through the defendants' neglect in repairing the sidewalk in one of the streets. The negligence complained of was in so defectively building or repairing the sidewalk as to stop up or not provide a drain or passage for the water to run into the gutter, in consequence of which the water went over it, and caused ice to be formed, on which in passing he fell and was severely injured. The jury returned a general verdict for defendants. On motion for a new trial plaintiff takes several grounds which may be ranged under two classes: (1) that there was misdirection as well as want of direction; (2) that the verdict was against the weight of evidence.

Counsel for plaintiff took exception to some general remarks of the learned Judge in respect to the plaintiff's right to take money out of the funds of the town, and his comparison with a city of larger size in respect to liability. But on reading what he said in connection with all the facts before him I do not think the remarks were of an objectionable character—in fact were only such remarks as any Judge might make in the course of his summing up to the jury. It is contended that he did not instruct the jury, that even though plaintiff was guilty of contributory negligence, yet if defendants by the exercise of proper care could have prevented the injury, the town was liable. This however was quite unnecessary under the facts here. That instruction is involved in what he said on the question of negligence. Then counsel complains that the learned Judge did not in his instructions distinguish between defendant's liability in case of misfeasance and nonfeasance. I am unable to see how plaintiff's case was in any way prejudiced by this omission, for the learned Judge treated the case throughout as one of misfeasance for which the town would be liable if the facts so warranted. He says: "You have got to form your judgment as to what the town council has done in respect to sidewalks and streets. Have they been negligent? Have they done the work in this particular locality in such a negligent manner as to make them liable? If they have not, that is the end of the matter. If they have not been guilty of negligence then your verdict must be for the defendants."

He then proceeds to direct the jury on the point of contributory negligence. He says: "Did the plaintiff himself contribute in any way to the accident that happened, because if he did contribute to it, then he has no right to recover at all, even if there had been negligence on the part of the defendants."

These instructions were quite correct, and the whole subject was properly placed before the jury, with some observations which in my view were eminently proper, when he says: "It will be for you to say whether a man going back and forwards to his work, who knew that there was ice there, which everybody saw there, would not have been prudent to go into the middle of the road and walk. There would have been no danger there from this ice. Do not understand me as saying he must do so."

I think every question of fact was left fairly to the jury with proper and sufficient instructions in point of law.

As to the second ground: After a perusal of the evidence I am of opinion that there was ample to sustain the verdict, and that there is no reason for setting the same aside. I think the motion for a new trial should not prevail, and that judgment should be entered for defendants with costs and costs of this motion.

NOVA SCOTIA.

FULL COURT.

JANUARY 26TH, 1907.

TRAVIS v. FORBES.

Sale of Goods—Principal and Agent—Undisclosed Vendor—Amendment—Costs.

Appeal by plaintiff in an action by him as indorsee against defendants as makers of a promissory note payable in instalments, and in the alternative for the price of an organ sold by plaintiff to defendants, argued before TOWNSHEND, J., GRAHAM, E.J., RUSSELL, and LONGLEY, JJ.

The sale was made by J. A. McDonald of the firm of Miller Bros. & McDonald, and a note, payable in instal-

ments, was taken in favour of that firm, but was indorsed by them in favour of the plaintiff, he being the sales agent for the territory where the sale was made. The action was tried before MEAGHER, J., who refused an application made after the close of the trial to amend by adding the firm of Miller Bros. & McDonald as plaintiffs, and gave judgment for defendants.

H. Mellish, K.C., and H. P. Duchemin, for appellant.

W. H. Covert, for respondents.

TOWNSHEND, J.:—This is an appeal from the judgment of MEAGHER, J., in favour of defendants. The plaintiff's case is that he is entitled to recover either as an undisclosed principal or as an agent of Karn & Co., and that McDonald of the firm of Miller Bros. & McDonald conducted the negotiations and made the sale to defendants as his agent. The learned trial Judge in coming to the conclusion he did, must necessarily have disbelieved that part of McDonald's evidence in which he swore that throughout he was acting simply in the capacity of plaintiff's agent, and nothing was pointed out in the course of the argument to show that he was wrong in coming to that conclusion, and the evidence strongly sustains him. Apart altogether from the rule that the finding of the trial Judge should not be disturbed on questions of fact except for some very strong indication that his finding was erroneous, I think the only reasonable inference to be drawn from McDonald's own testimony, taken with the written evidence, is that he was acting for Miller Bros. & McDonald, and that for some reason not disclosed, after the sale was made, he passed, or attempted to pass, the contract over to the plaintiff, who it may be was an agent of Miller Bros. & McDonald, but in this transaction he was neither an undisclosed principal nor an agent of Karn & Co. It is undisputed that no one of the defendants knew or heard of the plaintiff in connection with the sale until long after it was made, and the only payment that was made was to McDonald, who, it is true, passed it over to the plaintiff, but without defendants' knowledge. Then it was McDonald who assisted in raising the money through which this payment was made, and generally, from first to last, he, as acting for Miller Bros. & McDonald, was consulted and referred to in every way in which it became necessary to do so. The written contract was with Miller & McDonald, not as agents, but as one of

the principal parties to the contract, and when dissatisfaction arose and Mr. Simpson saw McDonald with a view to some new arrangement, he did not then pretend to deny their responsibility for the sale, but was willing to make certain concessions to meet the difficulty, even though, as he says, at a loss to the firm, and all this was done without any reference to plaintiff who was doing business in the vicinity. Who can read the letter addressed by Miller Bros. & McDonald to the Rev. Mr. Forbes, after McDonald's interview with Mr. Simpson, and have any doubt, so far as they are concerned, that the transaction was their own, when they say: "Now a Mr. Simpson comes in and says he has full power to make fresh arrangements, viz., we lose everything, time, expense, freight, concert and all; he will then compromise by buying a cheap organ. We shall only do business with you as pastor of the church, and also know that the ladies of said church would never be a party to such proceedings, breaking all kinds of contracts. We may have been wrong in selling so large an instrument and are prepared to suffer some and keep our arrangement with the ladies." etc.

Is this the language of an agent of Travis? In my opinion it completely destroys the value of his evidence given at the trial, and is utterly inconsistent with it, and plaintiff, to recover, must depend almost wholly on his testimony. The organ was ordered by Miller Bros. & McDonald from Karn & Co., and McDonald was instrumental in effecting the sale, and so far as plaintiff is concerned it does not appear that he paid for it or had anything to do with making the sale. It is true plaintiff states that he requested them to order it, and paid the freight on it, but that is quite consistent with his being their agent on the spot. On this point I can only again point to what is stated in Miller Bros. & McDonald's letter: "We lose everything, time, expense, freight, concert." Again: "We may have been wrong in selling so large an organ." If only an agent of plaintiff, why do they lose all these things? Why are they willing to suffer some loss? Why were they wrong in selling?

It would in my view be unreasonable to make any different finding to that which the learned Judge has made, and I think the only parties entitled to recover are Miller Bros. & McDonald.

On the second point we are all of opinion that the learned Judge should have allowed the amendment on proper terms by

adding Miller Bros. & McDonald as plaintiffs. The evidence so clearly disclosed their connection with the sale, and that the recovery if any must be in their name—in fact such was his own conclusion—that we think on every principle and authority the amendment should have been granted even though not asked for until after the conclusion of the trial. It is needless to cite authority on this point.

The remaining question is as to the terms on which this amendment shall be allowed. The defendants ask for a new trial if granted. If we could gather from the facts and proceedings that defendants would be prejudiced, or that any evidence might be given after the amendment which could not have been given before, or that they were taken by surprise in this respect, of course it would be our duty to accede to their request. But on reviewing the evidence, and after hearing counsel, the only suggestion made was that they might further show the worthlessness of the organ, but this question was gone into on the trial and was as much a defence against the present plaintiff as it would be against those added. We can therefore see no good ground for sending the case back for another trial to incur further expense. The appeal is therefore allowed with costs. Plaintiff to pay all costs of the action and trial except those issues found in his favour, and judgment to be entered in favour of Miller Bros. & McDonald for amount claimed; costs to be set off.

GRAHAM, E.J., read an opinion reaching the same conclusion.

LONGLEY, J., concurred.

RUSSELL, J., was of opinion that the amendment applied for was improperly refused, and that it should now be made, but dissented from the other members of the Court on the ground that it was shown by uncontradicted evidence that plaintiff had the exclusive right to sell the organs in question in Cape Breton, and that McDonald while purporting to make the sale in his own name was really acting in the matter on behalf of plaintiff. For this reason he was of the opinion that the appeal should be allowed with costs and judgment entered for plaintiff.

NOVA SCOTIA.

FULL COURT.

JANUARY 26TH. 1907.

REX v. LOVITT.

Banks—President Signing False Returns to Minister of Finance—Returns Prepared by Subordinate Officials—President's Knowledge of Falsity—"Current Loans"—"Overdue Paper."

Case reserved after conviction for making a false and deceptive bank return, argued before WEATHERBE, C.J., TOWNSEND, J., GRAHAM, E.J., MEAGHER, and RUSSELL, JJ., on the 5th of December, 1906.

The Attorney-General of Nova Scotia (Drysdale, K.C.), and T. R. Robertson, for the Crown.

S. H. Pelton, and E. H. Armstrong, for defendant.

WEATHERBE, C.J.:—The accused was tried upon an indictment under s. 99 of "The Bank Act," 1890. The words of the section are: "The making of any wilfully false or deceptive statement in any account, statement, return, report, or other document respecting the affairs of the bank is, unless it amounts to a higher offence, a misdemeanour punishable by imprisonment for a term not exceeding five years; and every president, vice-president, director, principal partner en commandite, auditor, manager, cashier, or other officer of the bank, who prepares, signs, approves or concurs in such statement, return, report, or document, or uses the same with intention to deceive or mislead any person, shall be held to have wilfully made such false statement, and shall further be responsible for all damages sustained by any person in consequence thereof."

In the indictment accused is charged as president of the Bank of Yarmouth under the second part of the clause.

It is needless, perhaps, in the view I take, to refer at length to the indictment which is attacked as fatally defective and because the trial Judge refused to amend it so as to give notice to accused of the actual offence for which he was charged.

Several questions were raised and reserved for the Court. Amongst others was the question whether there is "any or sufficient evidence to support the verdict of guilty against the accused."

If the question is answered in the negative it will be unnecessary to discuss others.

Eliminating unnecessary words, the charge here is substantially that a paper called a return for the month of November, 1904, under s. 85 of "The Bank Act" prepared by the chief accountant and the cashier, was a "wilfully false or deceptive statement" under the first part of s. 99 of the Act, and that this paper being signed by the president, John Lovitt, the accused, he is liable under the second part of s. 99.

This paper, printed at p. 56 of the case, is headed: "Return of the amount of liabilities and assets of the Bank of Yarmouth, Nova Scotia, on the 30th November, 1904."

This paper deals with all the details of the various liabilities (eleven different divisions) to the extent of \$384,944.47, and with the assets of the bank under 25 divisions to the extent of over \$800,000.

The return itself has a certificate as follows: "I declare that the above return has been prepared under my direction and is correct according to the books of the bank, H. G. Farish, chief accountant."

This is followed by a certificate signed by the cashier and president, as follows: "We declare the foregoing return is made up from the books of the bank, and that to the best of our knowledge and belief it is correct, and shows truly and clearly the financial position of the bank; and we further declare that the bank has never at any time during the period to which said return relates, held less than forty per cent. of its cash reserves in Dominion notes.

Yarmouth, N.S., this 30th day of Nov., 1904.

T. W. Johns,
Cashier.

John Lovitt,
President."

It is not pretended that the president made or prepared the return. It is true that in the indictment he is charged not only with making and preparing it but that he being president of the bank did: "Unlawfully and knowingly in contravention of the provisions of section 99 of the Bank Act and other provisions of the said Act in a certain monthly return made and sent by the said John Lovitt as such presi-

dent as aforesaid, to the Minister of Finance and Receiver-General for the Dominion of Canada, and received by the said Minister of Finance and Receiver-General, did make wilfully, false, and deceptive statements relating to current loans and overdue debts, and as to the assets, financial position, condition and affairs of the said Bank of Yarmouth, Nova Scotia."

It is proved that the entire return was made and prepared by the cashier, Johns, and the accountant, Farish, but the contention of the Crown on the argument was that with respect to two short lines out of the 50 or 60 lines of the entire return, the items were made up from the books and accounts of the bank falsely with the wilful intention to deceive.

The contention is confined to these two items so that nothing further need be said about the other items or statements or return or charges in the indictment.

The first item is, "Current loans in Canada, \$615,701.37." The other is "Overdue debts, \$23,342.10."

To understand the full significance of the charge it will be useful to remark that it is not charged that the whole sum of debts and loans, \$639,043.47, is diminished or enlarged. The charge is that a large part of the first item of the loans should have been added to that second item of debts. In other words, the suggestion is that there was a design on the part of those making and preparing the return to pretend to the Finance Minister that in supplying their customers they had been prompt in cases of notes and other loans overdue in obtaining renewals or collecting or giving time. I understand if a customer's note is overdue and he is tardy in renewing, or in the process of arranging for renewal, at the end of the month that loan will be returned as overdue, and not as a current loan. I can easily understand if for convenience to the customer there is an arrangement made, even against strict bank rules, to give a prominent customer a little time, in a case of the kind, it would not be a wilfully false statement to return this with current loans, and I am not sure that even where the time is given informally in strict law this must not go among the current loans; and if a customer of the bank, with large business, arranges to meet overdue payments from his customers who are the makers of the notes in the bank, with demand notes, though the signing and depositing the demand notes for some months is delayed for a few

days into the next month, that this should not properly be classed as a current loan. If it were so returned I am sure it is not a wilfully false return intended to deceive the Finance Minister or others.

I am dealing now only with the first part of s. 99, and not with the case of the president.

Did the cashier and accountant in making the return which they did make prepare it knowing it to be wilfully false for the purpose of deceiving some one?

What were the overdue debts on November 30th, which it is alleged were returned as current loans at the time? If there had been a large amount of "overdue" debts before the end of the month, and time had been given by the cashier and manager before that date, it would be necessary to return this as "current loans" I suppose.

The Crown, in this case, has proved at p. 44, that "an overdrawn account would be a current loan."

About half the business of the bank was with the Redding firm, doing a very large business all over the Dominion of Canada, and it is entirely in respect of their account with the bank this charge of a wilfully false and deceptive return is made. No such thing is suggested of any other of the half million of bank business.

And there is nothing to shew that the firm was known at the end of November, 1904, to be financially embarrassed.

There is nothing, I think, in the evidence to shew that at that date anyone knew or could have known that they had not property largely in excess of their outstanding liabilities. Nor do I understand that it is even now disclosed that as a matter of fact they had not enough property to pay all their debts on the 30th November, 1904, and that their entire losses did not take place after that date. So that we are, in respect of this 50 pages of evidence before us, unable to say whether if it had not been for the misfortunes of Reddings occurring after the month of November, the bank would have suspended payment.

It is, at any rate, obvious that if on that date, 30th November, new paper of Redding customers had been taken for what had fallen due, nothing was overdue of all the paper in question. Or if the matter is left in obscurity in the evidence, no conviction could stand for the preparing of a

return falsely made and wilfully intended to deceive. That, I suppose, was the part of the case under the first part of s. 99.

It is evident from the evidence of Farish that the classification of the Redding account to the end of November, 1904, by Johns was bona fide treated as a loan by himself and Johns. This evidence is produced by the Crown and counsel have not relied on it to shew that the return for the Government was prepared wilfully and fraudulently by representing that the Redding account was treated by the cashier, who had the sole charge of the business, as a current loan. The chief accountant who assisted in making and who signed the return, and who was produced by the Crown to prove that it was wilfully and deceptively false, admits that his notion, expressed on the stand, of the incorrectness of the scheme of making and classifying the overdue and current loans by himself and the cashier has been formed since this prosecution was inaugurated. His reason for giving evidence that the whole amount returned as a current loan was not so, was owing to this change of view. But he and the cashier had been going on under the old method for ten years at least. He never knew of any other scheme of classification. The November return was made up as it had always been made up. The evidence shows that long before the accused became president the same classification had been followed.

It is, I suppose, the duty of a bank not to permit paper to remain any time overdue without renewal or an arrangement to renew or to provide for renewing or securing the bank. The bank, I understand, when paper matures, should either give time or arrange in some way or collect.

And it is I suppose the customer's duty to take up his paper promptly on maturity or renew. I am not aware how far it is the custom to give time; but if time is given in any way bona fide after maturity pending renewal or some new arrangement, that amount at stake, I suppose, would be regarded as a current loan. Time may never be given so as to release a surety.

A bank with hundreds of thousands of overdue paper may be in a better position to-day than it may be to-morrow with all that paper renewed, and it may be much safer to give a short time verbally, or by some temporary understanding, than to give a longer time by new notes. We are not deal-

ing directly with the soundness of the bank. Nor is it shewn that this bank was unsound on November 30th, 1904.

The chief Crown witness says of "current loans" and "overdue debts," speaking of the return of November now under discussion: "This classification is simply a matter of banking practice." To refuse to give time on overdue paper may often work the ruin of a bank at a critical period. The theory of the Crown is (though, as I said, there was not a word of evidence) that the bank was "rotten" in November. And it was suggested that the method of giving time and treating overdue paper as a current loan might have been a fraudulent evasion of the Act. If Reddings were in difficulties such concession might have been a genuine attempt, by giving time, in the best interests of the bank.

Mr. Stavert, the curator, the chief Crown witness, proves that where overdue paper was held and a renewal note taken to cover it, and held with the overdue paper, that would still be called a current loan.

He is relied on to prove the government return prepared by Farish and the manager and cashier Johns, was wilfully and deceptively made under the first part of s. 99.

According to what appears to be the process and theory of the prosecution to establish their case, a paper is put in the hands of Mr. Stavert, made by his assistants and others, signed by himself, as to an investigation when the bank suspended, and not prepared for the purposes of this trial, or with this issue in view. Then the return of November 30th is shewn to him and he is asked his opinion as to whether overdue debts are classed in this return as current loans and—against the objections of prisoner's counsel—he is permitted to reply to a question eliciting such an opinion, namely, whether a part of the amount represented as current loans was "incorrectly" so represented. This is on p. 42 of the case. And all he says is he believes they are.

This is important and requires special attention in reaching an answer to the question reserved whether there is any legal evidence even against those who prepared the November returns. Practically there is no other than this class of evidence. This opinion seems to be based on the two papers in the hands of the witness. At any rate, he does not pretend it is formed on any other. I think it may safely be said

no better evidence than this has been furnished that Johns and Farish made a wilfully false report.

Stavert is asked this question, which is answered, though objected to by counsel for the accused: "Q. If the classification had been properly made and the overdue debts in L (that is the return for November) had been put under the head of overdue debts, would that have presented the condition of the bank in a different light from what it is represented there?" The answer is "Yes."

It is submitted that none of this is legal evidence, and on this no conviction could stand. It is obvious not only that this is a mere opinion based on a paper giving an account of an investigation by others, but the investigation was upon securities and accounts presumed, without proof, to have been the basis, and the entire basis, of the report signed by the accused. The Crown has shewn that all the material before the cashier and accountant was not available at the investigation for the curator.

The same witness, in his further examination, admits as to his answers referred to in respect to the November return, that overdue paper was classed as "current loans," that "demand notes existed for the exact amount of the overdue notes and were held together with the past due bills." The examination proceeds: "Q. Then why would you say that the notes held were overdue if they held a demand note covering them as well—why would you say that they were then overdue paper? A. Because the result of my investigation shewed the overdue paper as being part of the assets of the bank and not the demand notes. When I came here to take charge the overdue paper was in evidence and the demand notes that I speak of were not."

The witness says that he did not know of the demand notes at the time and if he had known of them it might have been a question how he would have classified the overdue paper. It appears from this evidence if the demand notes had been entered in the books to represent the loan and the overdue paper to represent collateral, they would have been classified as "current loans," and that it was "largely due" to the omission of entering them that they were treated as "current loans."

This all shews that this witness for the Crown must have been speaking of the November return all through his

examination when he proved that demand notes existed for the exact amount of the overdue notes. He appears to have had only two of these demand notes with him in Court.

He was asked if he had these notes of which he had been speaking or part of them, and produced only the two mentioned, dated in December.

So far the inquiry has been whether those who prepared the November return did so with a fraudulent design by the cashier and accountant.

There appears no evidence—none has been mentioned—not even a scintilla—that they did so. And even if they did so without the president's knowledge, he would not be liable. The Crown has shewn, as far as it can be shewn, that the classification of the Redding account was bona fide. At any rate there is nothing whatever, I think, to shew that it was wilfully false. The most that was attempted, it seems to me, was to shew that it was incorrectly done. The prosecution has furnished no legal evidence that one can put into words, to shew that there was even a mistake in the classification.

This brings us to the main question of the inquiry—the question to determine which the prosecution was instituted.

All that Lovitt, as president, certified was that the return in November was made up from the books in the bank, and that to the best of his knowledge and belief it was correct.

The accused did not classify the paper. There was no pretence of proof that his duty was to go over all the securities, vouchers and books, notes, bills and other documents in the bank—it would be ridiculous to stop at the Redding paper—even to check the monthly return. The evidence not only shews that this was no part of his duty, but that it would be impossible for anyone not a specialist and accustomed to the books and details of banking—it would be absurd to attempt such a duty. A prosecution would undertake a desperate task to convict on such an argument, and if such a conviction could stand it would sound a shrill note of warning to every bank director in the Dominion.

What object was there in shewing that the classification performed entirely by the cashier and accountant was wilfully and falsely made by them? Of course even if they did it

bona fide but incorrectly, and this was discovered by the president who allowed it to go forward, this would be evidence against him. It seems out of the question to say that there is a word to show this.

We were told there was Lovitt's own admission in evidence, given at a former trial to incriminate him on this indictment.

He was on that trial asked if he had not heard previous to November that Reddings were commanding a credit equal to the entire capital of the bank. He said he had been put upon inquiry in August, 1904, and upon investigation found that the amount owed by the Reddings, directly and indirectly, was \$474,000, but that the bank had customers' notes for the whole.

He admitted a dividend was paid partly from profits and partly from reserve; that Johns, the manager, made a report, and he, the accused, understood the Reddings account was secured by customers' notes.

What evidence, therefore, was there on the trial of the president, John Lovitt, to shew he was guilty of a violation of the statute which I have cited? I am of opinion that there is no evidence whatever upon which a conviction could stand. All that is said to the contrary is too general and is inapplicable. Greenleaf and some cases are cited to the effect that the state of mind may be shewn by outward circumstances or by the conduct of the person indicating the existence of guilty knowledge. It is wholly unnecessary to cite the authorities; that is elementary.

I have endeavoured in vain during the argument and since to find out what are the circumstances and what is the conduct to which to apply these principles, and I have written these pages to shew negatively there are none in the case before us. If there were any circumstances, and if there was any conduct, it seems to me it would be a short matter to mention it. I think that the case should have been withdrawn from the jury.

It may be proper to admit that the result of the investigation has been a complete surprise. It was perhaps useless to have attempted to shut our ears to the rumours with which the air seemed to be loaded so far away as Halifax, and I am afraid it was almost impossible that, even on a bench of jus-

tice, one could have entered on this inquiry without the expectation of disclosures similar to those in neighbouring communities.

It seems but justice now to confess that nothing similar has been revealed, and there is not a suspicion of the misapplication of a dollar; and so far as I have seen, nothing which indicates negligence—nothing in this case before us.

It was admitted that the accused was one of the largest investors and shareholders. He never lifted a finger to save himself by the use of his position or knowledge of the bank's struggle with a tide which seems destined everywhere to swallow all small undertakings.

With a verdict of guilty upon a record of sworn evidence so free from anything like fraud, it seems obvious, I think, that the newspapers, so busy often in trying issues, were trying these issues months before the Court was convened in Yarmouth where probably there was no one eligible to be empannelled who was without relatives or friends embittered by the loss of funds which they could ill afford to have suddenly swept away by the misfortunes of the bank.

MEAGHER, J., stated that he had reached the same conclusion.

TOWNSHEND, J., and GRAHAM, E.J., read opinions concurring in setting aside the verdict and ordering a new trial on the ground that the jury were not cautioned that they were not to be influenced by the other returns received in evidence in coming to a conclusion on the main issue respecting the offence charged.

RUSSELL, J., read an opinion arriving at the conclusion that while there was no evidence upon which he acting as a jurymen could have found the defendant guilty of criminal knowledge that he was signing a statement which misrepresented the position of the Reddings' account with the bank, it was open to the jury to disbelieve the statement of the chief accountant, Farish, and to infer knowledge, and that the case therefore could not have been withdrawn from the jury.

NOVA SCOTIA.

FULL COURT.

JANUARY 26TH, 1907.

SMITH v. THOMAS.

Landlord and Tenant—Agreement for Lease—Oral Demise to Take Effect at Future Date—Statute of Frauds.

Appeal by the defendant from the judgment of MCGILLIVRAY, Co.J., in an action to recover rent, argued before TOWNSHEND, J., GRAHAM, E.J., RUSSELL, and LONGLEY, J.J., on the 17th January, 1907.

S. Jenks, for appellant.

W. B. A. Ritchie, K.C., for respondent.

LONGLEY, J.:—The defendant on the 11th of November, 1905, rented a house from plaintiff in Amherst, at \$30 a month, for one year, beginning November 15th, and rent was to be payable from November 15th. The defendant did not move into the house, and two months from November 15th the plaintiff sued for two months' rent. The action was tried in the County Court, before Judge McGillivray. It was urged that plaintiff could not recover on account of the Statute of Frauds. The learned Judge below has given judgment for the plaintiff for \$30, one month's rent, on the theory that defendant was a tenant at will. It is not necessary to enter fully into the grounds assigned for the judgment below; but the defendant has appealed on the ground that the plaintiff cannot recover at all in an action for rent because this contract on the 11th of November was either an agreement for a lease, which not having been in writing was void under the Statute of Frauds (R. S. c. 141, s. 4), or that it is void under s. 3 of that chapter, because it was not proved that the rent reserved was two-thirds of the annual value, and also because it was alleged that the provisions of s. 3 only apply to executed and not to executory contracts.

I propose to deal with all these points.

If the contract between plaintiff and defendant on the 11th of November, the terms of which are not disputed, was an agreement for a lease to begin November 15th, four days later, then plaintiff is out of Court because an agreement re-

specting land cannot be enforced unless in writing. But to interpret the bargain made between the parties on the 11th November as an agreement for a lease is not in accordance with the evidence.

The plaintiff says: "He asked me if he would rent the house when would the rent commence. I said that it would commence on the 15th day of November, rent payable from that date. He told me he would take the house. I refused to rent the house for less than a year." Is it giving an unfair or strained meaning to these words to say that the parties made a verbal lease of the house at that moment? That the transaction was not an agreement for a lease, but an actual lease or demise of the premises? If this be so, in what respect does the matter fail to comply with the provisions of s. 3 of the Statute of Frauds? That section, which is identical with the English section and also with that of most of the Provinces of Canada, and States of the Union, says: "Every lease, estate or other interest in land not put in writing and signed by the parties creating or making the same—shall have the force of a lease or estate at will only." This part is plain. Then follows the exception: "Except a lease not exceeding the term of three years from the making thereof." For the purpose of this case, these excepting words are all that it is necessary to quote. But as the point has been raised as to the other words of the exception and they appear to have affected the mind of the learned Judge below, I will quote them and dispose of them so far as my judgment goes. The added words are: Whereupon the rent reserved amounts to two-thirds at least of the annual value of the land demised." It is not quite easy to see the force of this provision. But in this case the evidence seems to me to be ample to enable us to eliminate this exception. The rent was to be \$360 a year, and it appears in the evidence that the defendant objected that the rent was high. I think therefore that we may eliminate this objection, and that it need not have weighed with so much force upon the mind of the learned Judge below.

We come now to consider the extent and meaning of the words of the exception already quoted: "Except a lease not exceeding the term of three years from the making thereof." In this case if the transaction between the parties was a lease or letting, a demise, then it comes clearly within

the exception. It was for one year and four days from date of making, and was a lease or letting which could be made without any writing at all.

Here, then, the case might be left. But there is another element which must be carefully considered and that is the judicial interpretation of verbal demises such as the one under consideration, and how far they come within the provisions of s. 3 when they are executory in character, that is, to begin at a future date, and there has been no entry, because entry cures all these difficulties. The authorities seem conflicting, and it is not strange that counsel should reach the conclusion that verbal contracts, executory in their character, should be regarded as coming under the provisions of s. 4 instead of s. 3.

The earliest case, however, *Riley v. Hicks*, 1 Strange 651, is directly in favour of the proposition that a letting for less than three years can be enforced though verbal, and to be executed at a later day. But there followed later a line of decisions which seems to be in conflict with this, and which influenced judicial opinions in Ontario.

Two Ontario cases were cited which seem to bear upon the point under consideration (*Bank of Upper Canada v. Tarrant*, 19 U. C. R. 423, and *Moore v. Kay*, 5 Ont. A. R. 261.) The second of these cases is differentiated from the present case by the fact that the evidence revealed that there had been an agreement which was to be embodied in a lease at a future time. The Court held that this did not comply with the Statute of Frauds, and this is clear. If the agreement in this case is not a lease, the lease itself, then it cannot be enforced. In the *Tarrant* case, the facts were similar to the present case, and the judgment was based on *Edge v. Strafford*, 1 Cr. & J. 391.

I have carefully examined the judgment of Bayley, J., in that case, and although the result of it, at first sight, would seem to favour the contention of defendant herein, yet a careful reading will not confirm that view. Various objections were urged against the plaintiff's averments in his statement of claim, one of which alleges a letting for two or three years to begin at a future date, and claim was also made for damages for a violation of the terms of the agreement. Both of these open up fatal difficulties in reference to the Statute of Frauds, because the alleged letting is for a term

that might extend more than three years from the making, and any action for breach of the agreement to rent is inconsistent with the idea of an existing lease upon which rent is payable. No such difficulties exist in this case. The letting alleged and proved here is for one year from November 15th, 1905, and the claim is for rent under the allegation that a lease was made and no attempt is made to seek damages for failure to enter into an agreement. Bayley, J., deals with the apparent inconsistency between *Riley v. Hicks*, 1 Strange 651, and *Inman v. Stamp*, 1 Stark. 12, the first of which holds that a contract for letting for less than three years may be enforced by collecting rent whether there has been occupation or not, and the latter that such a contract is an interest in lands and must be in writing. (Citation from judgment and reference to *Bolton v. Tomlin*, 5 A. & E. 586, *Birkenhead v. Cummins*, 33 N. J. 44.)

I think there is a letting in this case and plaintiff is entitled to collect rent monthly. The judgment of the County Judge has not been appealed from by plaintiff, and though he has only found one month's rent due, yet all that can be done now is to dismiss the appeal with costs and direct judgment to be entered for the plaintiff for \$30.

GRAHAM, E.J., and RUSSELL, J., concurred.

TOWNSHEND, J., concurred in the result, but with some hesitation.

NOVA SCOTIA.

FULL COURT.

JANUARY 26TH, 1907.

SMITH v. ARCHIBALD.

Sale of Goods—Warranty—Latent Defect—Waiver—Damages—Misdirection—Undue Weight to Evidence of One Side—New Trial—Costs.

Application by defendant to set aside the verdict for plaintiff and for a new trial on the ground of misdirection, argued before TOWNSHEND, J., GRAHAM, E.J., RUSSELL, and LONGLEY, JJ., on the 16th January, 1907.

W. E. Roscoe, K.C., for the application.

J. J. Ritchie, K.C., and S. Jenks, contra.

The judgment of the Court was delivered by RUSSELL, J.:—This is an action for the price of trees sold by plaintiff to defendant, the defence being that the trees were expressly warranted, and that part of them were not according to the warranty. The cause was tried before the learned Chief Justice with a jury, and a verdict was found for the plaintiff for the whole amount claimed. The application is to set the verdict aside for misdirection and improper reception of evidence. The Court being unanimously of the opinion that there must be a new trial it will not be desirable to prejudice the case of either party by any references to the evidence beyond such as are necessarily involved in the statement of the reasons for our decision. The trees were sold according to a statement of quality which on the transfer of the property became a warranty in the strict sense of the term. The defect of quality, if any, was latent, and a large number of the trees that were resold to customers by the defendant died. Evidence as to several lots so sold was adduced to the effect that proportions variously estimated at from one-half to three-fifths had died after being planted. A contention was made under the evidence that the stock that died had not been properly treated, and also that it might possibly have been killed by the unusual heat of the season in which it was planted. For the reason already stated we refrain from summarizing the evidence on these points. The objection is taken to the charge that while the learned Chief Justice presented to the jury all the facts that made in favour of the plaintiff and commented strongly upon them in the plaintiff's favour, he entirely ignored the evidence that made for the defendant and explicitly told them that the difficulty he had in putting the case more favourably for the defendant, if his charge was unfavourable to him, which was undoubtedly the case, was that he could not tell anything else to put. I think we are all of opinion that where a Judge undertakes to put the evidence before the jury he is not at liberty to present in a strong light all the facts and circumstances that make for the contentions of one of the parties, and entirely, or practically, ignore the evidence that makes for his opponent; that a charge constructed on such lines is tainted with misdirection and that the verdict resultant thereupon in favour of the former will not stand unless the case is so clear that a verdict for the other party on the evidence before the Court would be set aside as one that no reasonable jury could give. For my own part I should feel bound to set

aside the verdict in this case on this ground even if there was no specific misdirection as to the facts or the law.

Among the specific misdirections with reference to the facts of which the defendant complains is the statement of the learned Chief Justice to the jury with reference to a certain lot of trees sold to one of his customers. It appears that 200 of the trees were sold to one Gustaffson in 1904, the season in which they were purchased from the plaintiff. It was too late in the season to plant them and they were "heeled in" in a trench in the usual way for the winter on Gustaffson's premises. In the following year they were taken out of the trenches to be planted on Gustaffson's place, when seventy of them were thrown out because they were dead and these had to be replaced by the defendant. Referring to this evidence the learned Chief Justice addressed the jury as follows: "Mr. Roscoe told you, and he dwelt upon it with emphasis, that the character of these trees was not known. That was his language and I took it down. He addressed you most forcibly to shew that the character of these trees was not as first known to Mr. Archibald. That is to say that he did not at the first know of the defects in the trees. He sent some of them away to a customer and the man followed immediately to plant them and he found them dead. If Mr. Archibald knew that they were dead when they were sent he would be trying to sell dead trees to this man. If he did not know he did not examine them. If he did examine them and he did not know that they were dead he is not capable of judging, and he should not have given the evidence. That must have struck you with great force when it turned out that he sold trees, seventy of which were dead. Were they dead when they went away from him and did he know it?"

The remarks so made to the jury were based upon a misconception of the facts. The man who planted these trees did not follow immediately upon their being sent out to the customer. They were not in fact planted until the following season; but it is on the supposition that he did immediately follow the trees in order to plant them, and then discovered that seventy of them were dead, that the learned Chief Justice asked the jury to say that the defendant must either have known that the trees were dead and must in that case have knowingly sold dead trees to the customer, or else must have been unable to tell the difference between a live tree and a

dead tree, in which case his evidence was unreliable and should not have been given. Of course it follows and was meant to follow that his evidence should not be believed by the jury.

There are other complaints of misconception of the effect of the evidence on the part of the learned Chief Justice with which, however, it is not necessary to deal. One such case as that referred to, with its inevitable reflection upon the character or the knowledge of the defendant, would be sufficient to vitiate the verdict. But the defendant also contends that the learned Chief Justice erred in his statement of the law and it is difficult to avoid the conclusion that there was error of a very serious kind in the statement of the legal principle applicable to the case. It has long since ceased to be the law that a purchaser of goods sold with a warranty is estopped from claiming for breach of the warranty by accepting the goods. Yet this, or something very like it, was presented to the jury as a statement of the law. His Lordship said: "Even if there was a defect it was competent to Mr. Archibald to waive it. He receives the goods and says nothing and leaves the other party to the contract under the impression that it will be paid. Under these circumstances, even if there was a defect, it is a question for the jury whether it was not absolutely waived. Even if you come to the conclusion that there was a defect you may say that it was waived."

The statement quoted is followed by a reference to the correspondence of the defendant from one of whose letters a promise is quoted that he will send the money for the trees, and it may be that the learned Chief Justice intended the jury to conclude that there had been a waiver, not merely from the fact of his receiving the trees without protest, but from this fact coupled with the correspondence. I doubt if there is any view of the correspondence possible which, taken with the fact referred to, would constitute the legal defence of waiver, but it is not necessary to examine the correspondence for this purpose or to express an opinion upon the legal proposition involved. It is enough to say that the jury might, from the language of this portion of the charge, very fairly infer, and would be very likely to infer, that it was open to them to conclude from the fact of the trees having been received without objection made at the time, although the defect was latent, that the defendant was estopped from setting up the breach of warranty as a defence when sued for the price. There is no law for such a proposition and if there

were no other objection than this to the verdict it would have to be set aside for misdirection.

It does not seem necessary to discuss the numerous other objections taken to the charge. It must not, however, be assumed that they are not substantial. There are several others which I think would have to be decided in the defendant's favour, but, if a new trial must be granted, the less that is said about the case the better.

The question of costs was seriously discussed, but I think that the one consideration advanced by Mr. Roscoe for the defendant is sufficient to decide it. The plaintiff, when the verdict was attacked, might very well have said that he could not support the charge to the jury. It was a very clear case and no counsel learned in the law should, as it appears to me, have entertained a serious doubt as to the result of an argument. He elected to go on with the struggle and has put the defendant to the costs of the argument. I do not therefore see how the Court can refuse the costs of the appeal; but as we are not of one mind on this point I agree that the costs should be costs in the cause.

GRAHAM, E.J.:—I agree that there must be a new trial, but I am of opinion that the costs should be costs in the cause. There are special circumstances. This course was followed in *Bray v. Ford*, [1896] A. C. 56, and in *Hamilton v. Scot*, [1904] 2 K. B. 262.

NOVA SCOTIA.

GRAHAM, E.J.

FEBRUARY 11TH, 1907.

THOMPSON v. THOMPSON.

Fictures—Small Building not Attached to Freehold—Consent of Owner of Freehold to Sale of Building—Right of Purchaser to Remove Building—License.

Trial of action.

J. L. Ralston, for plaintiff.

T. S. Rogers, for defendants.

GRAHAM, E.J.:—The defendant Gay Thompson occupied the land at Oxford, N.S., the scene of this litigation. It is

the land of his brother Clifford, but Clifford has been out west for seventeen years and Gay has charge of it for him. For the purpose of this action Gay owns it. In 1900 Gay's son, Morton, was given permission by Gay to construct a small building, he said for a hen house, and he gave him some materials for that purpose left over from a barn that Gay built on the place. It was 12 feet by 10 feet and had one window and a door. When it was finished the defendant, Gay, shewed Morton where to put it. It was placed near to another similar building upon the place and fronted on the highway inside of the fence. The sills rested upon two timbers, one above the other on their sides all the way around, about a foot and a half high, but was not fastened to those timbers in any way. A lean-to was constructed by Morton between these two buildings, which were seven feet apart, and the roof of the lean-to was put upon strips attached to each. There were about four cross piers from one building to the other and rough boards on these. He also dug a hole under it about five feet square. Gay was well aware of these things. There was an aperture without a door leading into the lean-to. Then Morton commenced to sell beer in the lean-to and for some time he used to sleep in the structure in question. Trouble came out of the beer selling. The community objected, and his father did also, and Morton left the building and offered to sell it to the plaintiff. During the negotiations the plaintiff went to Gay and told him that Morton wanted to sell him the building and asked him if he wanted it—that it was cheap. Gay said he did not want it and the plaintiff asked him if it was all right for him to buy it. He said he had no objection to his buying it, that he did not want it there, and that he could take it off in the spring. The plaintiff asked him what he wanted for the land and Gay said he only wanted him to fill in the hole and put the fence up across the front when he took the building off. There was no other requirement. The plaintiff agreed to that and he went back to Morton, who was waiting for this permission, and closed with him for the purchase of the building and contents, paying him \$5 on account. The plaintiff got the key from Morton and very shortly afterwards took away some things and locked it up, putting some things into it. Some time afterwards Gay met plaintiff and told him to separate the two buildings as he wanted to rent the other one. The plaintiff hired a man who separated the buildings by tearing down the lean-to and after that this structure was not at-

tached in any way to any building or to the soil. Later in the spring, when the plaintiff was about to move it, the defendant, Gay, told him not to take it just then, that Morton had sent word that he had not been paid for it, or fully paid for it. The plaintiff insisted that he had and that he had a receipt for the price. Later Morton and the other two met and Morton claimed that he had not been fully paid for it. This led to the difficulty. Later the plaintiff proceeded to move it and did move it out upon the highway when these defendants, Gay and his son William, objected and they moved back the structure upon the land again. The plaintiff of course could not then comply with the promise to fill up the hole and restore the fence. Then the plaintiff brought this action. The plaintiff had fully paid Morton the price for the building and there was a receipt given for it. I adopt the plaintiff's evidence.

But the defendants have raised two legal questions and their counsel has argued them with his usual ability.

First he contends that the structure was part of the freehold. Then he contends that the license to remove it was revocable and was revoked.

Saving the attachment to the other building this structure was not physically what is called a fixture. It was not placed there for any permanent purpose or for any purpose connected with the enjoyment of the land. It could be moved without injury to itself or the land. Gay and his son Morton recognized it as a chattel to be moved about. They had discussed his taking it to the Springhill right of way. It had been sold as a chattel and Gay had authorized its severance from the other building as if it was a chattel. It was always their intention to treat it as a chattel, and notwithstanding its attachment to the other building, it was, by the agreement between Morton and Gay, a chattel and not a fixture. I do not see how Gay can claim it was a fixture when he authorized its severance.

The right of the defendant Gay Thompson to claim that this building was a part of the realty is controlled by an agreement when it was placed on the land that it should remain personal property and be removable at its owner's pleasure. I refer to *Hobson v. Gorringe*, [1897] 1 Ch. 182, at p. 192, and citing *Wood v. Hewitt*, 8 Q. B. 913, and *Lancaster v. Eve*, 5 C. B. N. S. 717. In *Hobson v. Gorringe*, the owner of the fixture failed because a mortgagee of the

land without notice of the agreement entered and claimed it. I refer also to *Polson v. Degeer*, 12 Ont. R. 275.

I have said that it was an agreement. Such an agreement will be implied from the fact that the structure was annexed by the permission or license of the landowner: *Penton v. Robert*, 2 East 88. Even where the relation of father and son existed the agreement was implied: *Wells v. Banister*, 4 Mass. 514.

The American authorities are all one way. They are cited in 13 Am. & Eng. Ency. p. 625.

Two of the cases cited, namely, *Ham v. Kendall*, 111 Mass. 297, and *Deeming v. Ladd*, 22 Fed. Rep. 575, shew that such a structure retaining its status as a chattel by virtue of an agreement may be sold or mortgaged as such and that the mortgagee or vendee obtains a good title thereto as against the landowner.

I think that the American authorities shew that the defendant, Gay Thompson, could not revoke his license, which implied the right of removal given to Morton when Morton placed the structure there. But whether that is so or not, I am of opinion that the license given by Gay to the plaintiff when the plaintiff was purchasing the structure, was a license coupled with an interest, and that he could not revoke it. The law is quite clear that if the owner of land sells personal property situated on the land, the vendee has an implied license to enter and remove it, and in such a case the license cannot be revoked.

Then it is established that it makes no difference if the licensee's right to the personal property was acquired from another source than the licensor who owns the land.

In *Wood v. Manley*, 11 A. & E. 34, the defendant bought the goods then on the plaintiff's land, which had been distrained there by the plaintiff's landlord for rent and sold, and the conditions of the sale were that the purchaser might leave them there till Lady Day and enter to remove them meanwhile. "These conditions were assented to by the plaintiff." In *Wood v. Leadbetter*, 13 M. & W. 852, where this case is commented on with approval, I find these words italicised in the judgment of the Court delivered by Alderson, B. It was said in the earlier case by Williams, J.: "The plaintiff having assented to the terms of the contract,

put himself into a situation from which he could not withdraw."

In *Stirling v. Warden*, 12 Am. Rep. 80, Foster, J., said: "It is not indispensable to the condition of such a license that the right or title to the property sought to be removed should have been derived from the licensor. The license to enter the land and remove the property is a license coupled with an interest and so assignable and irrevocable if the licensee's right to the possession of the property is derived from another source, provided the party granting the license has assented to the contract or other condition of things whereby the licensee gains the title or the right to the possession of the property. And such assent may be inferred from the duty of the licensor to recognize the contract; or circumstances from which the other party's right is derived." Even if it was in form a license which could be revoked, it is clear from what was said in *Wood v. Leadbetter*, at p. 850, and in subsequent cases, that the permission to remove would be good as a promise, and there being a consideration, as I think there was when the plaintiff to his detriment parted with his money for the structure on the faith of Day's assent, he could by an amendment recover the same damages for a breach of the promise.

In *Thomas v. Jennings*, 75 L. T. N. S. 276, Hawkins, J., said: "But assuming the agreement purported in its terms to amount to a grant of a right and license to make entry upon the land and sever the materials from the freehold, and was in fact invalid as a grant because not in writing and sealed, I see no reason why it should not operate as a contract such as I have suggested, and as a contract it would clearly have been operative as against Welch as long as he was in possession or the premises were unlet."

I also refer to *Kerrison v. Smith*, [1897] 2 Q. B. 447, where it is laid down that although revocable and revoked under the doctrine of *Wood v. Leadbetter*, and a failure in that kind of action, trespass for instance, may ensue, yet there may be an action for the breach of the promise.

In my opinion, the plaintiff should have judgment for damages for the sum of thirty-eight dollars, and I have made allowance in that for the cost of filling up the hole and restoring the fence which the plaintiff would have been put to. The plaintiff will have the costs.

NOVA SCOTIA.

GRAHAM, E.J.

FEBRUARY 13TH, 1907.

DIMOCK v. STONEHOUSE.

Boundaries — Trespass—Ambiguous Descriptions—Natural Boundaries—Conventional Line—Admissions.

Trial of action.

W. T. Pipes, K.C., and E. N. Rhodes, for plaintiff.

C. R. Smith, K.C., and T. S. Rogers, for defendant.

GRAHAM, E.J.:—The plaintiff has replevied from the defendant 975 logs, and he is entitled to succeed in this action and only then if he proves that these logs were cut upon his land.

The plaintiff claims a part of the James Metcalf lot, and the defendant a part of the James Fountain lot, both granted by the same instrument from the Crown on the 27th May, 1828.

This Fountain lot was in form a parallelogram, 100 chains by 20 chains, contiguous at one end to the Metcalf lot on its longest side. Two of the other lots, one on either side of the Fountain lot, are respectively the Griffin grant, dated July 3rd, 1820, and the Charter grant, October 8th, 1828. All the lots in this tier are now called the Williamsdale lots. While the Charter grant is dated a few months after the Fountain-Metcalf grant, it is quite possible from the description in the latter, that the Charter survey had already been made. The date of the survey was one thing, but the delay in getting all the lots plotted and a grant of them issued was quite another thing in these times.

This is the description contained in the Fountain-Metcalf grant of the two lots in question. There were other grantees, the total acreage granted being 1,300 acres, but it runs thus: "Unto the said James Fountain that certain lot marked number one on the annexed plan containing two hundred acres, which is abutted and bounded as follows, that is to say: Beginning on the southern side of a branch of the River Philip at the north-western angle of land belonging to Benjamin Charter at a marked spruce tree, thence south 39° east (?west) along the line of said

Charter's land 100 chains to a beech tree; thence north 60° west 20 chains to the south-eastern angle of Joseph Griffin's farm lot; thence north 39° west (?east) along the line of said Griffin's land 100 chains to a spruce standing on the margin of said branch; thence following the course of said branch up stream to the place of beginning, according to the annexed plan. . . . Unto the said James Metcalf that certain lot marked number two on the annexed plan containing 300 acres, which is abutted and bounded as follows, that is to say: Beginning on the eastern side of a road leading to Bass River and on the south-western angle of Joseph Griffin's land aforesaid, thence south along the line of said road 61 chains to the south-western angle of William Metcalf's farm; thence east along the line of said lot 100 chains; thence north seven chains to a brook; thence north sixty degrees west 113 chains to the place of beginning, according to the annexed plan."

Now a mistake has been made (not to mention the one in the courses as already indicated) and it appears to be this, namely, the surveyor assumed that the Griffin lot and the Charter lot were all to the south of the branch of the river. But on looking at those grants and the plans annexed, it will be found that they avowedly cross, as the Rushton grant does, the branch, running further to the north. And he puts the Fountain lot wholly south of the branch where, controlled by the natural monument, I suppose it must remain. Having in mind the matter of variation it is remarkable that for the Griffin, Charter and Rushton grants, dated respectively 1820, 1828, and 1829, the courses of side lines and the end lines should have been literally taken from the courses of the lines of the Yorkshire grant in that vicinity, which was laid off as far back as 1775. And one can hardly expect to find the lines of the former locations to be parallel with or prolongations in the same course as the lines of the Yorkshire location. Moreover, if the course of the south lines of the grants to Charter and Rushton had been literally followed in location and they were senior grants, that line would never have reached the present east line of the Metcalf grant.

The course of the end lines of the Griffin and Charter lots is given in their respective grants as south 43° east, but this assumed that they were, at least at the rear, south sixty degrees east, and he gave that course to the Fountain

end line, in fact the whole of the line along the Metcalf lot, including even the Griffin lot. Also he assumed that the Griffin lot was bounded on the Bass River road, when the Griffin grant says nothing about that road. It may not have then existed, and the Griffin lot may not have gone as far west. Now all this has led to confusion. And I do not wonder that there have been lines through the woods of all kinds resulting from the conflicting surveys. It must be remembered that with the exception of the Griffin grant the Fountain-Metcalf grant is the oldest. Fortunately the locality of three lines of the Metcalf lot are not in dispute. But the length of the side line is in controversy. It is necessary to determine where the fourth line intersects them, and I commence with the east line where there is a natural boundary.

There is the principle which prevails in boundary questions, namely that, in case of inconsistency, a natural boundary generally controls courses and distances. The eastern boundary of the Metcalf lot runs "thence," i.e., from the William Metcalf grant on its south (which is not in controversy) "north seven chains to a brook." That brook is the Bulmer brook; it can be no other. It is delineated on the plan annexed to the Fountain-Metcalf grant when the line is shewn to run to it, and there is no other brook on the location corresponding to it. It controls the distance of seven chains, and I think that the line must be continued until it comes to that natural boundary, the brook. I suppose the surveyor made a mistake in his estimate of the distance, or in plotting made a mistake in calculating the length of the line.

There is a very considerable amount of evidence in favour of that corner. There is nothing worth speaking of on the line short of that point. At that corner there is a blazed corner on a hemlock tree about forty years of age, which is not very important, but there is near it a hemlock tree with a surveyor's blaze 80 years old, about the age of the grant, and there is a good deal of testimony of occupants on the Metcalf grant, and on the Stephens grant (one of these Williamsdale lots to the north), occupying up to and recognizing a division line there. And we have not such a condition existing in respect to the seven chains point on that east line.

Then we have to find the other corner of the Metcalf lot to connect it with the eastern side line. There is nothing to depend on except the senior Griffin grant location, but that must be respected. It is a boundary. The Fountain lot goes as far south, on the side line made common to the Fountain and Griffin lots, as the south-eastern angle of the "Griffin farm lot." And the Metcalf lot, on its north line, goes as far north as the south-western angle of "Griffin's land." That refers to the farm and land of Griffin, and of course according to the grant, and that grant having been made a boundary, controls, I think, courses and distances in the Fountain-Metcalf grant. From the way the description reads, we must take the true lines of the Griffin grant, rather than the lines which were assumed for it in the survey of the Fountain-Metcalf grant.

The counsel on both sides agreed on that.

This is the description of the Griffin grant: "200 acres of land situate, etc., on a branch of the River Philip, beginning at a hemlock tree marked 'J. G. B.,' standing at the distance of 20 chains, measuring in a right line on a course south 43° east from the beginning bound of George Oxley Junior's farm lot; from thence to run south 43° east, 20 chains or till it comes to a spruce tree marked 'J.G.'; from thence to run south 39° west 100 chains to a beech tree marked 'J.G.'; thence north 43° west 20 chains to a beech tree marked 'J.G.'; thence north 39° east 100 chains, or until it meets the place of beginning." And reference is made for shape, form and marks to a plat annexed.

We have nothing but the Oxley corner of the Yorkshire grant and four corner trees to go by in that description. And on the plan it is shewn to run north of the branch of the River Philip. There is also a brook running from end to end through the middle of it, and another small brook crossed by the line running from the Oxley corner. The Oxley corner is not in controversy. Apparently the present occupancy of the Griffin grant is not strictly in accordance with the calls of the grant, that is to say, the course of the Bass River road, now the western boundary, has not the course which the side lines should have, allowing for the variation. One can see how this came about. All of the trees have disappeared with but one exception, and over that one there is a stout controversy, namely, the beech at

the south-western boundary. But the blaze from a beech tree claimed to be that beech has been produced in Court. The age of the blaze as counted in the growth of the wood corresponds with the age of the grant. The tree has another blaze 40 years old. The defendant's two surveyors pointed out to me indications of part of a letter J on the older blaze, and although I am not very positive about it being part of a J, I noticed that the plaintiff, and he had two expert surveyors as witnesses, did not attempt very much to attack that blaze or its age, or even the appearance of part of the letter J, but confined himself to measurements with a view to shewing that the beech of the Griffin grant should be in some other place.

But it is not a mere beech tree with a blazed corner; it is at a corner of two lines on the ground.

The plaintiff's surveyor in cross-examination said, and it is an important admission: "Q. You found the beech tree on the extension of the line D. west? A. Yes. It would be at the intersection of the line D. west running south-east, with the line between the Griffin and the Fountain grants prolonged."

Later, he says: "Were you on that line between the Griffin grant and the Fountain grant? A. I was only on that line at the East Branch road, and between this beech and the point W. (the intersection of the Griffin-Fountain side line with the Dimock-Colborne line running further north), I found some old blazes. I traced them to see if they were the bearing of the line, and I found they were not. I cannot say what they were there for. They did not look like a surveyor's line. I found half a dozen. I did not cut them out. They appeared to be about the age of the beech."

Defendant's witness, Harrison, says: "Q. What kind of a line did you find between the Griffin and Fountain grants? A. No line in the clearing. An old line when we struck the woods at the clearing. We traced that old line up to the old beech tree corner at that line."

And Mills says: "On the Fountain-Griffin line, south of the Dimock line (and north of the Harrison line), I found a pretty well defined line, old blazes leading up to the beech tree on the Harrison corner."

And as to the other line leading to the beech tree he says: "Between the Lockhart corner and the beech tree I found an old birch tree shewing marks of the old line."

Either this beech tree is that corner or its existence cannot well be accounted for. All that the plaintiff can say in reply to it is that if the Griffin grant is laid out by strict measurements, its south-eastern corner would not be at that point.

I think that strict measurements are also against the plaintiff's theory. Measurement according to his theory will only give the Fountain lot 88 chains in length, when it should be 100, and in those times surveyors were very liberal.

It is probable that the distance of 20 chains was merely estimated. The tree would be supposed then to be the important thing, a permanent boundary in fact. Piggott's evidence tends to shew that the starting point of the Griffin location was near this brook, which is no doubt the brook on the plan, which the surveyor crossed on his supposed 20-chain line before he commenced to locate its proposed corners. And I think the plan shews that he had passed it some distance. The adjacent Halliday grant shews it was more than 20 chains. This theory puts the northern line of the Griffin location further south and shortens the distance to the beech tree, making it more conformable to the distance mentioned in the grant. The beech tree comes much nearer the proper distance, at least for the Fountain grant. But the controversy is about the distance from the Oxley corner to the brook marked on the plan. I think it should be measured on a course allowing for the variation since 1820, the date of the Griffin grant, and not since 1775, the date of the Yorkshire grant. The Griffin grant says so. The course in 1820 was to be south 43° east. That is south $38^{\circ} 30'$ east now, and hence it requires a longer line to join the brook owing to its course. And I therefore think that the distance is more nearly 25 chains, according to defendant's surveyors, than 20 chains, the allowance of plaintiff's surveyors.

Then it is contended that the line running west from the beech tree is too long for the south line of the Griffin grant. That depends on whether the Griffin location ex-

tended as far west as the Bass River road or not. As I have already intimated the Bass River road is not mentioned in the Griffin grant. The road was there later when the Fountain-Metcalf grant was surveyed, and its mention in that grant has constituted an assumption about it. Indeed it appears as if the surveyor for the Fountain-Metcalf grant ran athwart the Griffin grant. He could not plot it on his plan annexed to the grant without shewing, as it does, that he cut off part of it, making it an irregular figure, whereas the Griffin grant dominates the survey he was plotting.

It is contended that the existence of the beech tree was for some years not known, but that is not to be wondered at if the surveyor of the Fountain-Metcalf grant ran athwart the Griffin grant. His line would no doubt create an impression. But there is evidence, particularly of Clifford Taylor, tending to shew the existence of the Griffin line in accordance with this beech tree. On the whole, I adopt this beech tree, and find it to be the south-eastern corner of the Griffin location. The Fountain lot may in the result have an irregular figure, but that will follow from its being controlled on the west by the dominant Griffin location, while on the east there is nothing by way of evidence of the Charter survey to control it, and it must be left to its own course for the present.

Drawing a line from the point at the brook, which I have already dealt with, to this beech tree, and extending it by the appropriate courses and distances (namely, those of the Griffin grant, allowing for variation) to the south-western corner of the Griffin grant, or until it intersects the undisputed west side line, we have the fourth line of the Metcalf lot.

This line may not have the course of the Metcalf lot, but the course is controlled, as I have already intimated, by the boundary of the Griffin location. The side lines of the Williamsdale lot may appear in the woods as crossing the line I have adopted towards its eastern end, but those are to be attributed (if they really exist) to the surveys made for those grants and the renewing of those marks, whereas in truth the Fountain-Metcalf grant, being the older grant, prevails over these surveys or the marks in the woods.

2. The compromise or conventional line does not bind

the plaintiff in my opinion. His theory may have been shaken for the moment, but I do not know what he could have done to prevent Harrison from going on with it. He left the party.

3. The "old line," so called, cannot be depended on. It does not even run through the beech tree which the defendant supports so ably. It may have trees which were marked on some of the surveys, but they are not to be depended on.

4. There is practically no evidence of occupation on either side of the Dimock-Colborne line which would control the documentary title, as I have found it to be in this decision. Occasionally cutting down of trees and taking them away is not now regarded by itself as an act of possession good as against a documentary title. The plaintiff had not this land by possession even against a wrong-doer.

5. The defendant has made no admission in respect to lines which would prevail over the documentary title, or the evidence as to the true boundary. In the midst of so much confusion, both in the documents and in the lines on the ground, I can understand a man changing his theory about such a matter. In fact a very honest witness, James Ripley, apparently did so, and I would not be surprised if the defendant said something at variance with his present contention. But it amounts to very little as an admission. What did he know about it?

The description in the deed bounding the defendant "on land owned by Dimock" fixes nothing. We are only now finding out where Dimock's land is. And the defendant's title is immaterial. It is the plaintiff's title which is the important thing. His deed, as I have found, only takes him as far north as the beech tree.

Then in conclusion, I assume that the defendant's cutting, which was proved to be only south of the Dimock-Colborne line, and did not extend as far south as the Harrison compromise line, would not extend as far south as the line I have indicated. If I am wrong in that assumption as to any part of the logs, I will hear the parties when the judgment order is taken.

The defendant will have a judgment in the action and counterclaim directing a return of the logs; in default damages in the sum of \$390, with costs.

NOVA SCOTIA.

FULL COURT.

JANUARY 26TH, 1907.

REX v. MCGILLIVRAY.

Criminal Law—Arrest on Sunday—Magistrate Taking Bail on Sunday and Fixing Day for Hearing—Escape—Prohibition.

Application for writ of prohibition, argued before WEATHERBE, C.J., TOWNSHEND, J., GRAHAM, E.J., MEAGHER, and RUSSELL, JJ., on the 6th of December, 1906.

J. J. Power, for the application.

W. F. O'Connor, contra.

GRAHAM, E.J.:—This is an application for a writ of prohibition to a stipendiary magistrate.

One Daniel Morrison was arrested upon a Sunday on a warrant which had been issued under the Canada Temperance Act some days before. When brought before the magistrate upon the Sunday he, upon his own application for bail, made a deposit in lieu of bail, and the hearing was set down for a week day, namely, Tuesday, the 27th November, 1906, and he was discharged from custody.

On the 27th November, 1906, at the time appointed, he attended, accompanied by counsel, and secured an adjournment until Thursday, the 29th November, 1906, and agreed to leave the deposit there as bail for his appearance. On the 29th he appeared and raised the question of the legality of the arrest on Sunday, the bailing and fixing the day, and the defendant pleaded, but the magistrate took the evidence for the prosecution, and placed the defendant upon his defence.

Thereupon the defendant obtained an adjournment to the 6th of December, 1906, and put in a recognizance for his appearance, obtaining back the deposit.

I am of the opinion that s. 564, s.-s. 3 of the Code is made applicable to this case by the Canada Temperance Act, s. 107, and therefore that the warrant could be executed on a Sunday.

But it is contended that releasing the defendant on bail, and making the appointment for a hearing, are judicial acts performed on Sunday and therefore void at common law. The defendant says now that he should not have been released. Moreover that his deposit in lieu of bail was illegal.

The common law permitted the verdict of a jury to be taken on Sunday even in a civil case: *Swann v. Broome*, 3 Burr. 1595; *Hoghtaling v. Osborne*, 15 Johns. 119. The ground was that the jury out of reasons of humanity should not be kept shut up. As incidental to that it permitted the judge on a verdict of guilty being rendered upon a Sunday to remand the prisoner: *Stone v. United States*, 167 U. S. 196.

There are other things which were held to be incidental to the arrest in a criminal case on a warrant on Sunday, namely, the issuing of the warrant although that was a judicial act.

I express no opinion on the point as to whether releasing on bail and ex necessitate fixing a date for hearing would not be incidental to the execution of the warrant as the remanding of a prisoner for sentence after taking a verdict on Sunday even at common law is incidental to the taking of the verdict. I shall assume for the purpose of this case that it could not be done.

The arrest being legal and the bailing illegal there was what is called a negligent escape and there was nothing to prevent the defendant being retaken. In fact there was a voluntary surrender by the defendant.

Much of the learning about recapture after an escape has to do with whether the offence of an escape can be purged by the recapture. And here, whether the magistrate is liable or not for an escape there appears to be no difficulty about the defendant being retaken and about the jurisdiction to proceed.

I refer to 5 Eng. Ency. of Law, p. 52, tit. "Escape."

In 1 Russell on Crimes, p. 893, it is said: "A person who has power to bail is guilty only of a negligent escape by bailing one who is not bailable * * The difference between a voluntary and negligent escape will also require to be attended to in considering the effect in retaking a prisoner after he has been supposed to escape."

Dealing with voluntary escape, it is said, p. 894: "But if the party return and put himself again under the custody of the officer it seems that it probably may be argued that the officer may lawfully detain him and bring him before a justice in pursuance of the warrant. . . . An officer making fresh pursuit after a prisoner who has escaped through his negligence may retake him at any time afterwards, whether he find him in the same or a different county. And it is said generally in some books that an officer who has negligently suffered a prisoner to escape may retake him wherever he finds him without mentioning any fresh pursuit; and indeed since the liberty gained by the prisoner is wholly owing to his own wrong there seems to be no reason why he should have any manner of advantage from it."

I am of opinion that the magistrate had jurisdiction to proceed with the case.

I am also of opinion that for any such defect as is contended for in the procedure prohibition is not the proper remedy: *Barker v. Palmer*, 8 Q. B. D. 9. In that case it is decided that for defective or void service of process issued prohibition is not the proper remedy.

The application should be dismissed and with costs.

MEAGHER, J.: I concur in the opinion of GRAHAM, E.J., in every particular.

RUSSELL, J.:—I also concur.

TOWNSHEND, J., was of opinion that the writ should not be granted, on the ground that the taking of bail and fixing a day was not illegal, but an act which the magistrate necessarily did in connection with the arrest.

WEATHERBE, C.J., dissented, holding that the justice had no jurisdiction to proceed even if the arrest on Sunday could be justified, which he thought doubtful.

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NEW BRUNSWICK.

BARKER, J.

JANUARY 9TH, 1907.

PATCHELL v. COLONIAL INVESTMENT AND LOAN
COMPANY.

*Mortgage—Redemption—Accounts—Costs of Abortive Sale
—Invalid Conveyance to Nominee of Mortgagee.*

F. R. Taylor, for plaintiff.

W. W. Allen, K.C., for defendants.

BARKER, J.:—Though the bill in this case contains allegations altogether inappropriate to a redemption bill the suit has been regarded throughout as a redemption suit. The plaintiff claims a right of redemption which the defendants admit, but she makes charges of fraud and collusion and allegations that the plaintiff executed the mortgage in question in ignorance of its more important provisions, all of which charges and allegations are entirely without proof to support them. The plaintiff in her bill has offered to redeem, and in order to ascertain the amount due the matter was sent to a referee, who has reported that on the 18th December, 1906, the date of his report, there was due by the plaintiff to the defendants on the mortgage the sum of \$869.92. To this report the plaintiff has filed certain exceptions which came on for argument on the defendants' motion to confirm the report. The account seems to be a very simple one. The defendants were never in possession of the premises or in the receipt of the rents and profits. The

amount found due consists simply of the principal and interest due on the mortgage, less the amounts actually paid by the plaintiff and a charge for expenses of an attempted sale under the power contained in the mortgage. In November, 1902, the plaintiff being then admittedly in default, the defendants gave notice of sale under the power, and on the 31st January, 1903, the premises were offered for sale at auction and bid in by Mr. Smith at a price considerably less than the amount due, and a conveyance was executed to him. There is no question that Smith bid in the premises for the defendants as their agent, he in fact executed a reconveyance to them of the same date as his own deed bears. The sale was therefore abortive as an execution of the power and did not in any way prejudice the plaintiff as to her right to redeem.

One of the exceptions arises from the refusal or neglect by the defendants to file a debtor and creditor account with the referee, as is required to be done by accounting parties. Whether strictly speaking on a reference of this kind the mortgagee is an accounting party where he has never been in possession of the premises or in receipt of the rents and profits and where the amount due on the mortgage is merely an authentic collection of principal and interest due after deducting the payments made by the mortgagor, and which is therefore as easily ascertainable by one party as the other, it is not necessary to decide. For the defendants did in fact file an account, and even if it were imperfect, as the plaintiff contends, later on they filed a supplementary account to which there is no objection, and no one has been injured or prejudiced in any way. There is only one of the exceptions which is of any importance. The others were disposed of at the hearing, some of them were abandoned and I intimated an opinion as to the others adverse to the plaintiff's contention. There was some disagreement between the plaintiff and other witnesses as to the payments. She was either mistaken or they were. The referee had the witnesses before him; he had the advantage of seeing them under examination, and under such circumstances it is not the practice of this Court to disregard his findings as to facts in dispute. I have looked over the evidence and listened to the arguments on both sides, and so far from disagreeing from the referee, I think I should have arrived at the same conclusion as he has done. It is, however, sufficient to say that he had ample

testimony to warrant him in finding as he did, and this finding should not, in my opinion, be disturbed: See *Thomas v. Girvan*, 1 N. B. Eq. 257.

This covers all the questions as to the amounts paid by the plaintiff as well as the \$25 about which there was a special claim made.

The only exception of any importance in point of principle is that which relates to the allowance by the referee of the costs of the proceedings under the power of sale, amounting to \$52.26, including \$5 paid for the conveyance to Smith, I think the referee was wrong in allowing the \$5, but that he was quite right in allowing the remainder of this sum, \$47.26. In *In re Wallis*, 25 Q. B. D. 176, Fry, L.J., says that it is well settled that under the ordinary contract which arises out of the relation between mortgagor and mortgagee, if the mortgagor wishes to redeem the mortgaged property he must pay (1) the principal debt; (2) the interest thereon; (3) all proper costs, charges and expenses incurred by the mortgagee in relation to the mortgaged debt or the mortgage security; (4) the costs of litigation properly undertaken by the mortgagee in reference to the mortgage debt or the security; (5) the mortgagee's costs of the redemption action. Seton lays down the rule thereon: "Both in foreclosure and redemption actions the mortgagee is entitled to the costs of action, and also to all costs properly incurred by him in reference to the mortgaged property for its protection and preservation, recovery of the mortgage money or otherwise relating to questions between him and the mortgagor, and to add the amount of the sum due to him on his security for principal and interest." This passage from Seton on Decrees, 5th ed., p. 1613, is cited with approval by Cotton, L.J., in *National Provincial Bank of England v. Games*, 31 Ch. D. 582. See also *Henderson v. Astwood*, [1894] A. C. 150.

A sale of the mortgaged property under the power of sale was one of the means given to the mortgagees by which they could realize their money. It was therefore a perfectly legitimate proceeding on the defendants' part to give the notice which they did, and to do all that was done except executing the conveyance to Smith. If the plaintiff had intervened before the day of sale, filed her bill to redeem and obtained, as she could have done, an injunction staying the sale, there can be no doubt that the costs incurred up to that time would have formed a part of the redemption money which she would

have been compelled to pay. How does the fact that the conveyance was executed to Smith make any difference? If the defendants derived no benefit by it, the plaintiff was not injured by it, and why should she be placed in a better position by it? There is no suggestion of, or at all events, there is not the slightest foundation for suggesting, any fraud in the transaction or that the proceedings as to the sale were not bona fide in every respect. What is a mortgagee to do in such a case? If no sufficient bid is made for the property must the mortgagee sacrifice it and not only lose his money but incur the liability of accounting to the mortgagor for its full value? It is true that where a conveyance is made purporting on its face to be made in execution of the power, the mortgagor might in ignorance of the real fact be led into belief that the right of redemption was gone, and it may be said that in such a case the mortgagee should notify the mortgagor that the equity of redemption is still available. In this case—and I am only dealing with this case—there is not only not evidence or pretence that the plaintiff has in fact been in any way prejudiced by the conveyance, but there is the positive evidence of Mr. Smith himself, who was the defendants' agent at St. John, that about a week after the sale he told the plaintiff that by the terms of the mortgage, if she failed in her payments, the property would become the property of the company, but if she paid the balance, that is the amount due on the property, the company would give it back to her. The defendants' right to their expenses arises out of their contract with the plaintiff; it is not in the discretion of the Court whether they shall be allowed or not. The right to them, resting as it does substantially upon contract, can only be lost by some inequitable conduct on the part of the mortgagees, amounting to a violation or culpable neglect of duty under the contract: See *Cotterell v. Stratton*, L. R. 8 Ch. 295.

The exceptions will all be disallowed except as to the \$5. The report will be varied by making the sum due \$864.92 instead of \$869.92, and it will be confirmed in other respects. The amount will be paid into Court before 1st May next, to the credit of this cause, and on such payment and payment of the taxed costs, the defendants will re-convey to the plaintiff. In case of default in payment then the bill will stand dismissed with costs.

NOVA SCOTIA.

WEATHEBRE, C.J.

FEBRUARY 5TH, 1907.

TOWNSHEND v. BECKWITH.

Practice—Directing Argument of Points of Law—Appeal to Judicial Committee from Refusal to Quash Conviction—Concurrent Civil Action for Declaration of its Invalidity.

Action against magistrates for illegally ordering the seizure and destruction of liquor under the Canada Temperance Act, on the ground that they had no jurisdiction to order the seizure without a prosecution for the offence having been first initiated. Defendants relied on the search warrant, conviction and order for destruction. Before this action was brought an application for a certiorari to quash the warrant and conviction had been refused and from that refusal an appeal had been taken to the Judicial Committee and was standing for argument, notice of motion to quash the appeal as incompetent as dealing with a criminal matter having been given. In order to avoid any difficulty in this respect, this application was made to set down for argument points of law raised by the reply and defence with a view to an appeal to the Judicial Committee, to present in a civil action the points which had been raised in the criminal proceedings.

J. J. Ritchie, K.C., and J. J. Power, for the motion.

W. B. A. Ritchie, K.C., contra.

WEATHERBE, C.J.:—This action, for the recovery of \$10,000 damages for entering plaintiff's premises and taking spirituous and other liquors and destroying them, depends on a question under the Canada Temperance Act, decided against plaintiff on an application for certiorari, preparatory to bringing the action.

The decision has been appealed to the Judicial Committee of the Privy Council. Objection has been there raised that no appeal will lie in a criminal case and counsel in England have advised these proceedings as a precautionary measure for plaintiff.

If the question is decided as it will be against plaintiff by our Supreme Court, in accordance with the existing decision

between the parties, this will so far as our Court is concerned put an end to the proceedings.

It is a mere matter of form in order that if plaintiff should see fit, he may appeal. It is probably better for both parties that the litigation should not be delayed; for the plaintiff in order that he may as soon as possible know if he can recover his property; for the defendants in order that the loss, if it should fall on them, may be equally distributed.

I suppose that no course is so appropriate under the circumstances as granting an order to have the points of law determined by the Court, as early as possible.

NEW BRUNSWICK.

BARKER, J.

FEBRUARY 19TH, 1907.

THIBIDEAU v. LEBLANC.

Trust—Accounts—Collection of Book Debts—Carrying on Business—Laches—Interest—Commission.

James Friel, for plaintiff.

W. B. Chandler, K.C., for defendants.

BARKER, J.:—The defendant LeBlanc died after an answer had been put in and the suit was amended by substituting the present defendants who are his devisees. Personally they are under no responsibility as to the transactions involved in the suit, so I have, for convenience, preserved the original title of the cause, and to avoid misapprehension I shall refer to the original defendant LeBlanc, when I use the word defendant. This matter comes before me by way of exceptions filed by both parties to the referee's report on a special inquiry made as to the dealings between them. It seems that at the time the arrangement between the plaintiffs and defendant was made, the plaintiffs owned certain marsh and uplands in the county of Westmorland which they had for some time occupied and farmed, and upon a portion of which they had carried on the business of manufacturing brick. In March, 1889, the plaintiffs, who apparently had not much

business experience or capacity, found themselves unable to meet their payments, not, as they alleged, that they were insolvent in the sense of their liabilities being in excess of the value of their assets, but from their inability to procure such ready money as they required for immediate use. They then applied to the defendant, who was a brother-in-law of the plaintiff Thibideau, for assistance, and as a result of the negotiations which then took place, the plaintiffs conveyed all their real estate absolutely to the defendant for an expressed consideration of \$2,000, the amount at which the plaintiffs then estimated their liabilities; and at the same time they executed to the defendant a chattel mortgage on all their personal property to secure the sum of \$2,000, and interest at 7 per cent., payable in six months. It was a part of the arrangement made at the time that the defendant was to borrow on the security of the property and such of his own property in addition as might be necessary for the purpose, the sum of \$2,000, with which he was to pay the plaintiffs' debts or settle with their creditors in some way. The defendant did borrow this \$2,000 from Judge Wells, and as a security for its re-payment he gave a mortgage on all the plaintiffs' real estate, which had been conveyed to him, and some lands of his own. This mortgage is dated March 14th, 1889. The defendant gave \$500 of this money to one of the plaintiffs and he retained the balance. On the 10th April following—that is a month after the original transaction took place—the plaintiffs executed an assignment for the general benefit of creditors to the defendant. The assets proposed to be conveyed by this assignment are thus described—"their books of account, book debts, sums of money due or coming to them on notes, bills of exchange or books of account and the sum of money due them from Theophilus B. LeBlanc" (that is the defendant), "of the town of Moncton, N.B., balance of the purchase money for brickyard, land and goods and chattels conveyed to said LeBlanc by them in March, A. D. 1889, and all other property, effects and credits wheresoever situate of them, the said parties of the first part, except household furniture, and all the right, title, interest, claim and demand whatsoever of them, the said parties of the first part, of, in and to the said debts, book debts, accounts, money, property, notes and bills." This assignment contains a provision by which the moneys realized from the assets conveyed by it are to be appropriated first in pay-

ment of the expenses of collection and a commission of 5 per cent. on the sum realized, and secondly, in payment of the claims of such of the plaintiffs' creditors as should execute the assignment within sixty days. Public notice of this assignment and of the right of the creditors to come in and participate in the funds was duly given. In my opinion the description in this last assignment is sufficiently broad to include all the plaintiffs' rights in their real and personal property conveyed to the defendant by the first two conveyances or the balance of moneys realized from them after the trusts upon which these conveyances were made had been performed, and the objects for which they were made had been realized. This residuum, if I may so call it, would be held by the defendant under the general assignment for the benefit of creditors and subject to the trusts declared in that instrument. The first question to be determined is one of fact, that is, what were the purposes and objects for which the first two conveyances were made and accepted and for whose benefit and with what object was the brickmaking business carried on by the defendant, as it in fact was carried on, during the years 1889, 1890, and 1891? The plaintiffs in their bill allege that the defendant during these years had full charge of the brickyard and carried on the business, though they and a son of the plaintiff Cormier worked at the business, and in the tenth section they allege that the defendant said he would manage the business for them and that they would have an opportunity of redeeming their property; and in the eleventh section they allege that "during the time he ran the brick business for the plaintiffs" he made large profits. The defendant admits that he did agree with the plaintiffs to assist them in the running of the business, that he sold most of the bricks and collected money for them, paid the wages and expenses. He says: "I was anxious to help the plaintiffs and we hoped that between us we could run the business and pay off the debts due by the plaintiffs and the mortgage against the property out of the profits of the business, and I was willing to do what I could to assist the plaintiffs to carry this out." In the twelfth section he says that "the business was not carried on after the end of 1891, as it was unprofitable, and I could not carry it on any further myself, and the plaintiffs themselves were unable to carry it on." I shall not stop here to define the exact relations then created between the parties as to this business, so as to determine the principle upon which liability

for losses should fall, further than to say that I think there was no partnership created. I think the plaintiffs correctly describe the business as being carried on by the defendant for them in the sense that he was the legal owner of the property, took the control and had the management of the business for the same purpose as that for which the property was transferred, that is to realize a fund for the payment of the plaintiffs' creditors, and in that way for the plaintiffs themselves. For the property itself and the profits of the business, if there were any, the defendant must in any event be accountable. If from all sources the business and property realized more than enough to meet the debts and the other legitimate charges so that they are paid, or for the purposes of this suit must be so regarded, what remains, whether in the nature of property undisposed of or in money, must go back to the plaintiffs.

After so long a lapse of time, and in the absence of any very well kept account by the defendant, there are necessarily difficulties in the way of reaching accurate results as to some of the transactions involved in this account. The defendant is not charged with default in the management of the brick-making business; it is only alleged against him that as between him and the plaintiffs he has satisfied by the use or disposal of the property conveyed to him for that purpose the plaintiffs' liabilities, and that whatever remains in his hands, subject to charges for interest or remuneration, should be handed back to them. The object of the account taking is to ascertain what amount of money came into the defendant's hands under these assignments for the purposes for which they were made, and what the defendant has done with it. I shall not deal with the exceptions separately, for the account can be more conveniently dealt with in a more general way. It naturally divides itself into four divisions: (1) the moneys derived from the brickmaking business; (2) the moneys derived from a sale or disposal of the personal property not involved in the brick business; (3) the money chargeable against the defendant for debts collected under the trust deed; and (4) the money for which the defendant is accountable by way of rent or otherwise by reason of his use and occupation of a portion of the real estate.

Taking them in their order: What are the facts as to the business? In the schedule of property assigned by the chat-

tel mortgage it will be seen that in addition to the plant for carrying on the business there were on hand 50,000 bricks and 150 cords of wood. These bricks were sold and the wood was used in the business and go to make up the so called profits. It is, in my view, of no importance in what account this stock in hand is included, for, as I have already pointed out, it is clear to my mind that the understanding was, and the object of the plaintiffs in making the assignments was, to secure by the assistance of the defendant from the use or disposal of the property money to pay their debts. And it is of no importance whether the money was realized as profits of the business or as proceeds of the sale of property or otherwise. The referee has made up the account on the basis of the defendant retaining all the property, but I think it should be stated on a different basis. He has reported a profit on the three years' transactions of \$2,649.74—that is a profit in 1889 of \$2,682.28, a loss in 1890 of \$591.79, and a profit in 1891 of \$559.25. Both sides agree that these figures are wrong, especially as to the wages of the plaintiffs charged to the defendant. As I state this business account, it shews a profit or rather a net surplus of \$743.77, after allowing the defendant credit for the moneys actually paid on the plaintiffs' account and charging him with \$210, the value of the wood on hand when the business closed.

Business for 1889.

Total expenditure as per referee.....	\$4,717 55
Add cash paid plaintiffs	135 92
	<hr/>
	\$4,853 47
Deduct item 50,000 brick	\$ 500 00
“ cord wood	300 00
	<hr/>
	800 00
	<hr/>
Expenditure	\$4,053 47
Total receipts as per referee.....	\$7,399 83
Deduct wages	766 08
	<hr/>
	6,633 75
	<hr/>
Surplus	\$2,580 28

1890.

Total expenditure as per referee	\$2,942 99
Add cash paid for plaintiffs	282 46
	<hr/>
	\$3,225 45
Total receipts as per referee	\$2,351 23
Deduct wages	619 54
	<hr/>
	1,731 69
	<hr/>
Deficit	\$1,493 76

1891.

Total expenditures as per referee	\$1,536 81
Add cash paid for plaintiffs	432 39
	<hr/>
	\$1,969 20
Total receipts as per referee	\$2,096 06
Deduct wages	469 61
	<hr/>
	1,626 45
	<hr/>
Deficiency	\$ 342 75

\$1,493 76 wood on hand, \$210 charged to defendant.

342 75

Net surplus \$743.77.

1,836 51

2,580 28

743 77

The business was not carried on afterwards, and if I am correct in my statement of the results, the stock on hand in 1889, as well as that manufactured afterwards, had all been disposed of, \$743.77 stood to the credit of the fund for the payment of debts, and the plant used in the business still was in hand though depreciated in value by the wear and tear of three seasons' work. The plaintiffs had contributed to that result by their labour for which they had received something in return, and the defendant had given his services, whatever they were, without remuneration.

We come now to the money derived by the defendant from the sale of the property; and first as to the real estate. The referee reports that six acres of marsh were sold in 1895 to Rupert Kirney, and eight and a quarter acres of upland were sold to one Ganong, but at what particular time he was unable to ascertain. No evidence of the actual price paid for

these lands was given, but the referee has reported that the value of the Ganong lot is \$80, and of the other \$420, in all \$500, and I think the defendant must be charged with this sum. It seems also that in 1896 the defendant borrowed \$600 for which he gave a mortgage to McSweeney which is unpaid.

As to the disposal of the personal property conveyed by the chattel mortgage, the referee reports as follows: "The 50,000 brick were sold by the defendant during the brick-making season of 1889 for the sum of \$10 per thousand. The 150 cords of wood were used at the brickyard during the brickmaking season of 1889, and all other personal property mentioned in the said bill of sale was left in the said property by said plaintiffs to said T. B. LeBlanc and used on said farm or in said brickmaking business from the date of the said assignment until the spring of 1892, when the said defendant took and removed therefrom the following articles mentioned in the bill of sale, that is to say: The bay horse, which he afterwards disposed of to one Thomas Ganong for 30 cords of wood of the value of \$1.50 per cord; the one single truck waggon, the four sheep with their increase up to the spring of 1892, which at this time had increased to ten more of the value of \$3 each; one of the sets of bob sleds and the 10,000 feet of boards. The plaintiffs retained the black horse, the single driving waggon, the double truck waggon, the red cow, the brown cow, and the calf, and used and converted the same to their own use. All the remainder of the personal property mentioned in the bill of sale consisting of the following articles: one set of bob sleds, two sets of double harness, one set of single harness, one plow, one dung cart, one cart saddle, the brickmaking machine, and the wheelbarrows, were left on the farm in the brickyard from the spring of 1892 without being under the apparent control of anyone, with the exception of the brickmaking machine, a portion of which the said defendant afterwards loaned to one Cummings to be used in his brickyard and some of the wheelbarrows which were taken away by a man named Ross and removed to Bathurst, and said last mentioned articles, including that portion of said brickmaking machine left in said brickyard and the remainder of said wheelbarrows are at the present time in such a dilapidated condition that no portion of the same is of any value whatever." There seems to be no doubt as to the defendant hav-

ing actually taken for his own use the property as the referee has found. The referee has charged him \$355 for the bay horse, a truck waggon, the sheep, a set of sleds and the boards, and this sum is said to be much beyond their value. Except the sheep all of this property has been used in the brickyard for three years. Twelve dollars a thousand for boards of that class does seem excessive, and that the defendant would sell a horse worth \$150 for \$45 worth of cord wood seems unreasonable. I think the \$355 should be reduced to \$250. The referee has also charged the defendant with \$400 for the brickmaking machine and with \$24.50 as the value of the seven wheelbarrows. The former sum seems to be excessive. It was a second-hand machine when the plaintiffs bought it, and I think \$300 is full value for it. As to the wheelbarrows I think the defendant ought not to be charged with them. The plaintiffs were there on the ground; they took and retained a considerable portion of the property, and if these barrows were of any value I think they ought themselves, under the circumstances, to have taken care of them.

As to the third division, the debts collected, I think the referee has also erred. He has reported that there was no wilful neglect on the defendant's part, but he has at the same time charged him with \$616.49 for debts which might have been collected in addition to \$211.38 actually collected. The book debts assigned by the trust deed amount in all to \$1,028.45, distributed among 85 persons. One amount is \$381, but the others are all for small amounts, many of them less than a dollar. The defendant gave the list over to a solicitor for collection; he collected \$211.38 but no more. He was examined by the referee and gave some explanation as to the difficulties he met with. The amounts were small and in many instances there were contra claims practically balancing the account. The solicitor's explanations naturally, after a lapse of some nineteen years, are somewhat general and not so satisfactory as one would like, but it is worth remark that in the case of debts so easily collectible as the referee seems to have thought these were, it is a wonder the plaintiffs themselves, pressed as they were for money, had not made some effort to collect these debts before assigning. \$616.49 would have been a respectable payment on an indebtedness of \$2,000. There is no doubt I think that the defendant was quite within his right to employ an attorney to

collect these accounts and there is no question made as to the propriety of selecting the solicitor for the purpose. In that case the onus is upon the plaintiffs to shew the liability: *In re Brien*, 26 Ch. D. 238. The difficulty of collecting book debts is put forward by the plaintiffs themselves in their trust deed as one of the reasons rendering the assignment necessary. I think the defendant ought not to be charged with this sum.

This brings us to the last division, the charge for the use and occupation of that part of the premises which the defendant occupied and practically used as his own for several years. The permanent improvements placed on them the referee reports as worth \$627.80, and as he has stated the account there was a balance of \$435 due by defendant to the end of 1903. Owing to two clerical errors this balance should be \$345. The item of \$1,314 should be \$1,404, and the item of \$160 is a mistake for \$180. There are some items in the account for 1894 and 1895 about which there may be some question and to which objections have been filed. They are, however, small in amount. In reference to these as well as other matters with which I have already dealt, I desire to say that the finding of a referee as to questions of fact should not lightly be set aside. Referees are the sworn officers of this Court, to whom, except in special cases, matters of accounting go for investigation. They have the witnesses before them and their conclusions upon questions of fact depending in whole or in part upon oral testimony submitted to them ought not to be disregarded except in cases of manifest error: *Thomas v. Gervan*, 1 N. B. Eq. 257. I have already pointed out that whatever property remains undisposed of after the trusts of these assignments are satisfied should go back to the plaintiffs, as they have asked by their bill, and the present value of that property is therefore unimportant. The addition to its value by reason of permanent improvements is accounted for as well as any diminution properly chargeable against the defendant. A motion was made by the plaintiffs to amend their bill by striking out certain words in sections eleven and twelve, which allege that the brick business was to be carried on for the plaintiffs. I must refuse that motion for I think the allegation as it is entirely supported by the evidence. If it were otherwise it would be difficult to establish any fiduciary relation as to that method of using the property between the parties or to understand why all the expenses of taking

the account of the business were incurred. The defendant was a mere volunteer in this matter, doing the best he could in the supervision he gave to the business, and the plaintiffs were there themselves at work all the time and find no fault with the management. If under those circumstances there was a loss it would be as unreasonable that the defendant should bear it as it would be that he should in the case of profits hold them for any other purpose than for the payment of the plaintiffs' debts. I think there is a balance due to the plaintiffs of \$912.48 stated as follows:—

Total account.

Receipts.

Amount borrowed from Judge Wells.....	\$2,000 00
Sale of real estate	500 00
Amount borrowed from McSweeney for which property mortgaged	600 00
Cash from Bliss Thibideau.....	150 00
Debts collected	211 38
Surplus of brick account.....	743 77
Horse, waggon, sheep, bob sleds and boards..	250 00
Brick machine	300 00
Use and occupation to November of 1903...	345 00
“ “ “ 1904...	220 70
“ “ “ 1905...	271 30
15,000 feet pine logs at \$8.....	120 00
8,000 feet spruce and hemlock at \$4.....	32 00
8,000 feet spruce framing at \$4.....	32 00
40 yards building stone at \$1.50.....	60 00
	<hr/>
	\$5,836 15

Expenditures.

New barn	\$ 400 00
Clearing land	208 00
Ditching land	19 80
Stevenson, cash	12 00
Cormier, note	23 00
Patrick Cormier	500 00
Debts	926 04
E. Givard	4 00
Wells' mortgage and interest...	2,830 83
	<hr/>
	4,913 67
	<hr/>
Balance due	\$ 912 48

There remains but one other question which is not set up in the answer but which was argued at the hearing, that is, that the creditors are not in any way parties to this suit, and therefore no decree can be made by which the property in the defendant's hands for the benefit of creditors can be ordered to be reconveyed to the plaintiffs unless all the debts had been fully paid or are to be so treated as between the parties to this suit. I think it right to state in view of any appeal which may be taken from the decree about to be pronounced, that in my opinion the property ordered by it to be transferred to the plaintiffs is held by the defendant in trust for the unpaid creditors who have placed themselves in a position to take a benefit under the trust deed, if there are any. The evidence shows that it was executed by two alleged creditors at the time it was executed by the parties in April, 1889, now nearly eighteen years ago. The two creditors who executed the deed are Toombs & Givard as assignees of one Wm. J. LeBlanc who was then an insolvent, and B. Toombs & Co. Strange to say, I cannot find either of these names in the list of plaintiffs' creditors in March, 1889, or in the list of debtors paid. It appears that Toombs & Co. also failed. Givard, who acted as the solicitor in making all these transfers by the plaintiffs, who was a witness to the execution of the trust deed and collected for the defendant such sums as were collected of the debts, says in his evidence: "I do not remember that Toombs & Co. rendered me an account in this case. I do not remember making inquiries of the plaintiffs as to how they stood with Toombs & Co. Toombs & Co. failed. I did not inquire into their estate. I do not remember that I ever filed any account with the assignee of Toombs & Co. in this matter. I do not know who the assignee was." Earlier in his evidence he speaks of their being cross-accounts between Toombs & Co. and the plaintiffs. Speaking of the other claim, Givard says that the money which he as attorney for the defendant collected on the plaintiffs' account, and which I have allowed at \$211.38, he appropriated in payment of the LeBlanc claim as assignee of that estate, which he says amounted to \$360.08 as appears from LeBlanc's own books. The referee does not seem to have been impressed with the industry displayed by Mr. Givard in his collection of the plaintiffs' debts, and he expresses the opinion that their estate has made a loss of \$616.49 through his negligence in this respect. While there may be some foundation for this

view, it is to be recollected that not only were the amounts small and distributed among a large number of persons, but in many instances there were contra-accounts which reduced the claim, and many of the persons had themselves become bankrupt and gone out of business. The assignment for the benefit of creditors was made in April, 1889, now nearly 18 years ago, and upwards of 14 years before this suit was commenced, and with the exception of the two alleged creditors who executed the deed at the time it was made there has been nothing to shew on the part of the others anything amounting to acquiescence in the deed or indicating an intention on their part to participate in its benefits one way or the other. They have remained altogether inactive. This suit was commenced in December, 1903, and it is not an unfair inference to draw that its nature and object have become well known to many of the so-called creditors. Notwithstanding this, and the fact that the litigation has now been pending for over three years, no one creditor has entered in any way with a view of enforcing his claim under the trust deed or otherwise. Under all these circumstances, I feel justified in dealing with the estate on the basis that all unpaid creditors, if there are any, have long since abandoned any right which they may have had to come in under the trust deed, and that the rights of the parties to this suit should be determined on that basis. The deed itself was only made for the benefit of those who should come in and execute it within 60 days from its date. While that period is not exclusive, it is a provision which has some significance after so long a period has elapsed. In *Gould v. Robertson*, 4 DeG. & S. 509, the creditor was not permitted to come in under the deed where a much less time had elapsed than in the present case. (Quotation from the judgment, and reference to *Nichols v. Tutin*, 2 K. & J. 18; *Birn v. Mount*, 24 Beav. 642.)

I see no reason why these plaintiffs should not get their property back because it is possible that some creditor may hereafter wish to participate in this fund, when no such creditor has during all these years actually done so; where there is no reason for thinking that any will come forward, and every reason for thinking that if he does his right to do so at this late date would not under all these circumstances be recognized or sustained.

Provision, however, must be made for the two persons who have executed the deed, that is if they really are creditors. Mr. Givard seems to have appropriated the \$211.38 collected by him for the defendant in payment to himself as trustee of LeBlanc of an indebtedness due by the plaintiffs, amounting as he said, by LeBlanc's books, to \$360.08, in which case there would be a balance coming to the LeBlanc estate and all of the Toombs claim for which provision should be made. The defendant does not seem to have given much if any attention to his duties or responsibilities as trustee under the deed for the benefit of creditors, and he must be held responsible for the proper appropriation of this \$211.38. I have already pointed out that in the list of persons to whom the plaintiffs were indebted in March, 1889, there is no reference either to LeBlanc or Toombs, and as that information is furnished this Court in reply to a special inquiry, I must infer that the plaintiffs did not owe either of them when they assigned. Neither does either of these persons appear in the list of the plaintiffs' debtors, also furnished by the referee in reply to a special inquiry. In addition to this the referee does not include the LeBlanc estate among the debtors paid. I can only conclude that, according to the referee's finding, there was no outstanding account between them, in which case the defendant would properly be chargeable with the \$211.38, and not entitled to any credit for payment to the LeBlanc estate. I have gone through LeBlanc's evidence, and in it while he says his books shewed a balance due him of \$360 as due from the plaintiffs on April 9th, 1889, he immediately adds: "Bliss Thibideau (that is the plaintiff) owed me at the time he failed over \$160." And it is evident from his cross-examination that there were credits to which the plaintiffs were entitled which would materially reduce that sum if the balance was not really the other way. The plaintiff Thibideau, who kept such accounts as were kept by the plaintiffs, says that he could not make up the account between them and LeBlanc; that they were in the habit of giving him notes for his accommodation, and that he did not think when they failed they owed LeBlanc anything. The plaintiff Thibideau also says that he thought Toombs owed them something when they failed. According to Toombs' evidence an open account had been running between the parties for over ten years, and he says that the

plaintiffs owed him \$53.88 on May 16th, 1889. He admits however that he has not credited the value of several sales of bricks charged against him by the plaintiffs, which he says are not correct. On his cross-examination he seems to admit that the amount was not \$53.88, but something less. The fact is that so mixed up were all these transactions and so carelessly were the accounts kept, that at this late date even the parties themselves can tell very little about them or get at their true balance. Givard was Toombs' assignee and he never seems to have filed a claim for anything or in any way done anything to get anything from the plaintiffs' estate. Neither is there any exception to the finding of the referee as to the list of creditors and debtors to which I have referred, or that the amount paid to creditors should be increased by any claim of the LeBlanc estate.

As to the remaining questions of interest to be allowed to the plaintiffs or remuneration to the defendant, I shall make no order except as to interest on the balance found due, which should bear interest at five per cent., from the date of decree. The data are altogether too uncertain for any satisfactory calculation as to the allowance of interest if there were no other objections. As to the remuneration, I do not think the defendant has shewn that he is entitled to much consideration; any interest would be against him, and of that he has the benefit as I have not allowed any. In addition to this, his accounts have not been satisfactorily kept, and whatever may have been the plaintiffs' laches in bringing this suit, and for which they offer a want of means as an explanation, the defendant has no good reason to give for not having closed this matter up long ago.

The defendants must have their costs of these exceptions, and the plaintiffs must pay the costs of their exceptions which will be overruled. The report will be varied by substituting as the balance due \$912.48, instead of \$5,660.87 as found by the referee, which the defendants will pay the plaintiffs, together with costs of suit. Order also a reconveyance of the property unsold and delivery of possessions.

PRINCE EDWARD ISLAND.

HODGSON, J.

FEBRUARY 14TH, 1907.

IN RE McMURRER.

Habeas Corpus—Practice—Grounds of Objection to Prisoner's Detention Not to be Stated in Writ—Rule not Necessary—Notice to Committing Magistrate and Prosecutor Sufficient—Notice to Attorney-General not Necessary—Amended Commitment after Fiat for Writ—Intoxicating Liquors—Prohibition Act — Offence in County Outside Charlottetown — Jurisdiction of Magistrate Sitting in Charlottetown—Imprisonment in Default of Payment of Fine.

Application of John McMurrer, a prisoner in Queen's county jail, to be discharged from imprisonment.

E. O. Brown, for prisoner.

The Attorney-General of Prince Edward Island (A. Peters, K.C.), contra.

HODGSON, J.:—This is a matter of a habeas corpus for which I gave a fiat on the 5th February instant.

The jailor having produced McMurrer before me returned to the writ that he detained him by virtue of a warrant of commitment under which the prisoner had been lodged with him, copy annexed, and of a warrant in substitution therefor, copy also annexed to the return.

This commitment was made by Mr. Brehaut, stipendiary magistrate for Queen's county having jurisdiction therein outside of Charlottetown; the latter named place being within the jurisdiction of the stipendiary magistrate of Charlottetown. The conviction was under the Prohibition Act, 1900.

Several objections were taken to the manner of issuing the habeas corpus in this case, and as there seems to be some misapprehension as to the correct mode in which the writ ought to be issued, I think it better in the first place to address myself to this point.

Originally a habeas corpus could only be issued returnable in vacation before the Lord Chancellor; and Lord Hale says

that "at common law neither the King's Bench nor Common Pleas could grant that writ but in term time."

The Habeas Corpus Act, 31 Car. II. c. 2, was therefore passed to enable and require any Judge in vacation in case of imprisonment for any criminal or supposed criminal charge, except cases of treason or felony, plainly and specially expressed in the warrant of commitment, to issue the writ as therein mentioned. This statute conferred no new rights on the subject, but extended the already existing common law powers of the Lord Chancellor to issue the habeas corpus in criminal cases to the Judges and Barons.

The right of the subject is guarded by heavy penalties. One of the statutes imposes a penalty of £500 and costs upon the Judge if he refuses to grant a writ when he should have done so, and it has been held that he is liable even although his refusal proceeded from the most honest doubts: *Crawley's Case*, 2 Swanst. 11, 12; *Ward v. Snell*, 1 H. Bl. 10.

The penalty, however, is confined to a Judge, and does not extend to the Court: Hawk. b. 2, c. 15, s. 24.

In this case it is alleged that the writ has been improvidently granted, and that I should not have given a fiat. I cannot see how the prosecutor can contend that there existed no doubt as to the legality of the prisoner's detention, for so strongly did these doubts impress himself that he substituted another and amended commitment in the place of the former so that the prisoner is now held under a commitment other than that under which he was detained when I gave the fiat for the writ.

The writ does not issue as a matter of course; it must be grounded on an affidavit of a probable reasonable ground for the complaint, and it must be made by or on behalf of the prisoner, and on this affidavit the Court or a Judge are or is bound to exercise their or his reasonable discretion.

56 Geo. III. c. 100 (Imp.) gives jurisdiction to a Judge in vacation to issue a writ of habeas corpus, when the person is confined otherwise than for some criminal or supposed criminal matter and except for debt on process (i.e., legal process), and power is given to examine into the truth of any of the facts set forth in the return "and to do therein as justice shall appertain." This statute is not in force in this province.

It was urged by the Attorney-General that the habeas corpus in this case should not have been general, that is that it should have stated the grounds of objection to the prisoner's detention.

I entirely differ from this. No instance can be found in which the writ is otherwise than general. There are some Imperial statutes passed in the reign of Geo. IV. declaring that no writ of habeas corpus is to be granted for prisoners for offences against smuggling and the customs unless the objections to the proceedings are stated in the affidavit, but the cases founded on that statute have no application to that now under consideration.

And it must be remembered that the parties applying for this writ, especially over three hundred years ago, were very frequently poor and so illiterate as to be unable to read or write. To require them to set forth in writing the grounds upon which they contended their imprisonment to be illegal would, in most cases, have amounted to a denial of justice. The statute of Charles II. confirming the writ of habeas corpus and providing new remedies to the subject for obtaining it was the outcome of the people's resistance to the tyranny of the government during the Stuart period and the corruption of its then judiciary. And Judges do not even in these comparatively happier days listen favourably to suggestions that obstructions and difficulties be placed in the way of those who claim that they are suffering from wrongful imprisonment and from availing themselves of what has ever been regarded as the great safeguard of their liberties.

It is stated in Chitty's Criminal Law that no grounds whatever need be stated, and in Chitty's General Practice of the Law, vol. 1, p. 693, it is said: "The writ of habeas corpus is general, without stating the grounds or reasons of the same."

It was urged by the Attorney-General that a rule should have been issued, under which the return might have been sent to me by the jailor without bringing up the prisoner. It is true when the writ was applied for I did suggest a rule as being the easier and quite as effective a remedy as the writ. The prisoner's counsel declined to adopt this course and pressed for his writ. He was quite within his rights in this because the prisoner has a right to be present at the argument for his discharge and to hear what is alleged why he should be detained. The granting of the rule is for the

benefit of the prisoner only. If he is ill or the distance great from the place of his imprisonment, and he is too poor to supply conduct money, the Judge out of consideration for him will grant a rule directing the jailor to return the cause of the detention and order his discharge if he should think him entitled to it.

In May, 1901, a man named Raynor was confined in the Summerside jail. He was poor and could not afford to pay the travelling expenses of himself and the sheriff of Prince county to Charlottetown and then return, and so for this reason I granted an order to the jailor demanding him to return as follows: 1. Had he such a man as Raynor in custody? 2. When had he so received him? 3. What was his authority for detaining him? I inserted nothing else in the rule, neither grounds nor arguments; I wanted to know nothing except the answers to these three questions. And it became my duty to see whether the cause of detention was sufficient. It never occurred to me to notify the Attorney-General, or direct him to be notified. Those only were notified who were responsible for having caused his arrest.

And in this I followed the practice of all our Judges in this province since we have had Judges. I have directed the clerk of the Crown to examine among our records from the earliest times and he has not been able to discover a single case in which grounds or reasons have been set forth in a habeas corpus or in a rule ordering the cause of detention to be sent before a Judge. In *Sproule's Case*, 12 S. C. R. 140, in which a rule was granted, there were no grounds stated, and when at the bar, I obtained a rule for the discharge of a prisoner returnable at Ottawa before the late Judge Henry; no grounds or reasons were expressed in the rule, nor were they looked for.

Objection was taken by the Attorney-General to the notice given by the prisoner's solicitor to the committing magistrate and the prosecutor that the prisoner would be brought up before me "in order that he may be discharged out of custody."

This notice is perfectly correct. It is exactly in the form given in *Corner's Crown Side Practice*, p. 65, in *Archbold's Practice of the Crown Office*, p. 345, and in *Short and Mellow's Practice of the Crown Office* (ed. of 1890), p. 644.

It was urged by the prosecutor's counsel that it was requisite to serve a notice of the writ on the Attorney-General. It was true I suggested this when the writ was issued, but the prisoner's counsel was quite in accord with the practice when he confined the service to the prosecutor and the convicting magistrate. The practice requires nothing further nor shall I. I think that the greatest care should be exercised lest obstacles are created and the issue of the writ obstructed. And I am desirous of stating that it is not necessary for a prisoner to notify the Attorney-General before or at the time of the issue of the writ. If this were so that official's absence from the province would operate as a suspension of the Habeas Corpus Act.

I have gone into this question fully because the practice of this Court and of its Judges, and of the Court at Westminster, has been challenged, and I thought it better to express my views upon the matter. The practice which has been followed in this case is exactly that which has been followed by our Court and Judges since we have had a judicial system and as well by the Judges at Westminster since the time of Charles II. I overrule all the objections taken by the Attorney-General to this writ of habeas corpus and the mode of obtaining it.

The prosecutor's counsel filed at the hearing the notes of the convicting magistrate, when the prisoner was convicted before him. If the prisoner is properly convicted upon the evidence, I do not see why the notes are produced before me. If he is not so properly convicted, I am not sitting here in appeal to overrule the magistrate's finding. I shall not look at these notes. As to whether he has been guilty of an infraction of the Prohibition Act rests with the magistrate and not with me. My duty alone requires me to inquire whether the prisoner is held under a commitment which shews jurisdiction, and whether that jurisdiction is shewn upon its face. That being so the prisoner must be remanded to prison.

One of the objections taken by the prisoner's counsel to his detention is that the commitment does not shew that the offence (selling liquor) was committed in a place where the magistrate had jurisdiction to enforce the penalty for having so sold.

Unquestionably the fact must appear that the committing magistrate was clothed with jurisdiction to execute his office where the offence was committed. This has not been done,

and if the prisoner's detention now rested upon the committal lodged with the jailor when he was imprisoned, I should have been bound to discharge him.

But the prosecutor has filed an amended conviction and commitment in substitution for those previously made. The prisoner's counsel contended that these were too late and that after a habeas corpus has been issued and immediately before its return a new commitment cannot be issued and substituted for a previous one, and set forth in the return as a cause for detention.

I am of opinion that the prosecutor has such a right, that it was exercised in time, and that it comes before me as the ground for the prisoner's detention: *Regina v. Richards*, 5 Q. B. 926; *Regina v. House*, 2 Man. R. 58; *Regina v. McCarthy*, 2 Ont. R. 657.

Another point taken by Mr. Brown is that while 57 V. c. 16 (the statute which gives the stipendiary magistrate his jurisdiction) by s. 6, authorizing him to "sit and try" cases in Charlottetown for an offence committed in the county outside of Charlottetown, yet that signing the commitment is not any part of the "hearing" of the case, which includes judicial acts only, and that a commitment is not such an act. This to me is a contention which requires so strained and far fetched a construction of the statute that I cannot assent to it. It seems hard to believe that the meaning of that enactment is that the magistrate may try cases up to conviction, but when it becomes necessary to sign a committal he must remove out of Charlottetown in order to sign. It seems to me that the magistrate when in Charlottetown was really within his jurisdiction, but that he has no power to deal with any offence which had taken place therein. The sixth section is very awkwardly expressed and really does more harm than good; to "sit and try" is a very uncouth and undignified expression. One of course sees what is meant. In Ontario the word "acted" is used, which certainly is more exact and conveys more meaning than "sit and try." I do not think that s. 6 is wanted and its only effect is to suggest doubt where none exists.

The last point taken by Mr. Brown is that the term of imprisonment runs from the date it was pronounced.

I would entirely agree with this if it were a punishment under the Criminal Code. In such a case I should have no

doubt. But this punishment is not given directly. It is an alternative substituted for that of paying the fine. The man brings about his own punishment by not paying the fine; so he takes the alternative—imprisonment. I express no opinion if this had been a third offence, but this case is not within the principle of *Ex parte Smitheman*, 35 S. C. R. 189 and 490.

The prisoner must be remanded to prison.

NEW BRUNSWICK.

FULL COURT.

JUNE 15TH, 1906.

REX v. WILSON; EX PARTE BURNS.

Justices Court—Application to Review Judgment—Time—Delay in Obtaining Copy of Proceedings—Explaining Delay—New Trial—Dismissal on Default—Practice—Form of Rule Nisi.

An order made by Wilson, Co.J., on review from a magistrate's court in the case of *Burns v. Myers*, was brought before this Court by certiorari and rule nisi to quash in Hilary Term, 1906, on the following grounds:

1. That the County Court Judge had no jurisdiction as the application for the order for hearing was not made within the time prescribed by the statute: C. S. 1903, c. 122, s. 6.

2. That the County Court Judge had no power to order a new trial, or a verdict for the defendant in the alternative, if the plaintiff did not bring the cause down for a new trial within a time specified.

The matter was argued in Easter Term, 1906, before TUCK, C.J., HANINGTON, LANDRY, BARKER, McLEOD, and GREGORY, JJ.

J. D. Phinney, K.C., showed cause against the rule nisi.

O. S. Crocket supported it.

A preliminary objection that the rule nisi to quash should be discharged because it did not direct within what

time and upon whom the rule and affidavits upon which it was granted should be served as required, as was contended, by Rules of Court of Michaelmas Term, 1899, was overruled, McLEOD, J., dissenting, and judgment on the merits was reserved.

TUCK, C.J.:—This case brings up the same question as is found in *Lunt v. Kennedy* decided at this term of the Court, reported ante p. 295. There my opinion was that where in a review from a magistrate's court the application is made within thirty days from the time of receiving a copy of the proceedings from the justice, the jurisdiction to hear the review is complete. The circumstances of this case are different, but the same principle is involved as in *Lunt v. Kennedy*.

This case of *Thomas C. Burns v. Jude Myers* was tried before a justice of the peace for the County of Kent, and a jury, on the 26th of August, 1905, when a judgment and verdict were rendered for the plaintiff for \$30. Upon an application in review to the Judge of the York County Court, he ordered this verdict and judgment to be set aside with costs, which he taxed at \$24.50. And he also ordered that the cause be remitted to the justice for a new trial according to the provisions of C. S. 1903, c. 122, with the alternative that if the plaintiff did not bring the cause on for another trial within two months of the service of the order, then a verdict should be entered for the defendant.

As I have said, Judge Wilson allowed costs of review at \$24.50. I do not see that the costs allowed are excessive. At all events it seems to me that in view of the facts they were in the Judge's discretion.

At the outset an objection is taken as to the Judge's power or jurisdiction to review under C. S. 1903, c. 122, s. 6. which provides that "the judge may at any time within thirty days after such judgment, or after obtaining the copy and minute aforesaid, appoint a time and place for hearing the matter, and notice thereof shall be given the opposite party," etc. Now the circumstances of this case as to the time of applying to Judge Wilson are different from the ordinary ones, and I am not sure, looking at all the facts as disclosed by the affidavits, that the defendant is not himself in default in making his application. And this I say without in any way contravening an opinion already expressed, either here or elsewhere, that a party may apply

any time within thirty days after obtaining a copy and minute of proceedings and judgment.

A verdict was given in this cause on the 26th of August, 1905, and according to the affidavit of the defendant he at once demanded a copy of the evidence, a minute of the cause of action, etc., which the justice of the peace promised to give him; that on the 25th of October, 1905, when the plaintiff applied to the justice to issue an execution, he informed the plaintiff that owing to his absence from home he had delayed giving the copy of the proceedings to the defendant until the 16th of October, 1905; that on that day the justice informed the plaintiff, and this appeared by his record then and there read by him to the plaintiff, that the justice gave the defendant a copy of the evidence, etc.; that thereupon he (plaintiff) delayed issuing execution until on or about the 12th of December, 1905; and also that the copy of the proceedings was not laid before Judge Wilson until the 20th of December, 1905. If this statement of facts is correct, then it is clear that the copy of proceedings in the case was not laid before Judge Wilson until long after the thirty days had expired from the time it was received.

Mr. Ferguson, the justice, makes an affidavit which is in effect the same. He says that the defendant at the conclusion of the case then and there demanded a copy of the evidence, a minute of the cause of action, the grounds of defence, and the result, with a view to reviewing the said cause, and that he promised to make them out for him; that he (the justice) went away as stated, and on his return about a month later, some time in the first part of October, the defendant called twice for the return: that he made a copy of the proceedings for the defendant and put them in an envelope for him, but he did not call for them, and the same remained in his office until the 10th of December, 1905, when he delivered the copy to H. H. James, defendant's attorney, and that at Mr. James' request he dated the return in December. I have read the affidavit of Mr. James, but it does not lead me to discredit the affidavits of the plaintiff and the justice.

On this ground alone, of the application to Judge Wilson being made too late, I think the plaintiff ought to succeed on this motion.

But on the merits also he should succeed. I have read Judge Wilson's judgment and he gives no reasons of any

kind for setting aside the verdict in favour of the plaintiff. While the form of the order, made in the alternative, is right, yet the finding on which the order was based was simply arbitrary, without reasons. I think the verdict entered by the magistrate was right.

For these reasons I think the rule must be absolute to quash Judge Wilson's order.

HANINGTON, J.:—With the greatest respect to my brethren who are of opinion that the Court below has no jurisdiction without an explanation of the delay, I submit that the error lies in this, and the authorities cited by my brother Gregory apply only to cases where there is discretion in the Court as to whether it will hear an appeal and exercise its power of reviewing the decision.

That doctrine is quite correct when it is in the discretion of the Court, as it is with reference to a certiorari, and that that is correct was discussed and settled by this Court after a very long argument on both sides, in the case of *Doe d. Estabrooks v. Humphrey*, 12 N. B. R. 104, where application was made to the discretion of the Court to order a new trial in an action of ejectment because the time prescribed by statute, twenty years, would have run if the lessors of the plaintiff had to bring a new action, and the authorities state that to be in the discretion of the Court. The judgment being recovered the party against whom the appeal lies has a fixed right, and the Court should see that injustice is not done, and that they exercise a strictly legal discretion, not merely discretion based upon theory or the view of any judge or Court; and that is exactly the difference here. The exercise of a discretion and judgment on the merits is an entirely different matter from a discretion to refuse to hear.

It makes no difference at all, in my judgment, in this case, whether the judge received an explanation or not, for the reason that he has no discretion; the statute C. S. 1903 c. 122, s. 6, does not give him any. It says: "Upon these being laid before a Judge of the Supreme Court, or a Judge of the County Court, with an affidavit of the party that he thinks substantial justice has not been done him, the Judge may at any time within thirty days after such judgment, or after obtaining the copy and minute aforesaid, appoint a time and place for hearing the matter, and notice

thereof shall be given the opposite party; and the Judge shall after such hearing, decide the cause according to the very right of the matter, etc." The papers are there, the application is made according to the terms of the statute within thirty days after the party received them, and therefore there is no discretion with him; the papers being before him, under the statute he is bound to decide the matter according to law and the right of the matter. The practice of review in civil causes before justices originally was by certiorari. Then you could come before the Court and the Court in their discretion could allow you to make the appeal at any time they pleased. The present mode of review was not known till many years after the statute passed giving justices summary jurisdiction in civil causes. That being so, as long as the facts exist the Court has jurisdiction. If there are existing facts why the review should not be had they could be proved at any time before the Court in which the question is raised. It is clearly so decided in this Court in review cases. Applications are constantly heard in this Court where the question is whether they had or had not jurisdiction.

Assuming it is necessary to show the delay was properly accounted for and not attributable to the party seeking review, that can be shewn by affidavit, on shewing cause, as well as originally. But as I have already said, the difference is that by the statute giving review, if the facts are submitted to the Judge within thirty days after they are received then he has jurisdiction and can exercise it; and if justice is not done he should deal with the matter as the statute directs.

I think under the statute it is perfectly clear. We cannot make the statutes. It has been 60 or 80 years since this provision was established by the legislature, and it has not changed it, and we cannot change it.

Another substantial point was that Judge Wilson ordered a new trial which he has power to do under the statute; but he also ordered that should the plaintiff fail to bring on the new trial within a certain time the order reversing the judgment would be absolute. I think that under the terms of this statute he can order a new trial, imposing terms. That being so the order was a very reasonable and proper one.

In *Cormier v. Thibideau*, 3 N. B. R. 297, it was held that the courts below shall follow the course and practice of this Court as far as applicable to carry out the power given to them to deal with the subject, as far as necessary to secure the rights of parties. A Judge having the power to order a new trial, orders it and then provides that the party succeeding in the court below must bring the cause down to another trial within a certain time or a judgment shall be entered against him. I see no objection to such an order. On both points this rule nisi I think should be discharged.

LANDRY, J.:—In this case the affidavit used for obtaining the order for hearing stated that application had been made to the justice of the peace, who tried the cause in due time; that the application was made to the review Judge within thirty days after obtaining the papers, and then the ordinary form of affidavit, but as to the time expiring from the time of the signing of the judgment and obtaining the returns, something like four months, in the original affidavit, there was no explanation as to why there was that delay; but that affidavit did state positively that it was presented to the Judge within thirty days after being obtained, without explaining the delay of four months.

I have expressed in my judgment in *Lunt v. Kennedy*, ante p. 295, the view that when a party applies for a review and more than thirty days elapse between the time of the judgment and the time of applying, the delay should be accounted for as a matter of correct practice, and I think the Judge would be exercising a just discretion to refuse granting the order until the delay had been explained. Because if it was shewn it was simply the delay of the party applying, then in his discretion the Judge would not grant the order, and therefore it is well that it should be known to the Judge at the time why there was so much delay, and if it appeared clearly it was not the fault of the applicant, but the magistrate's fault, or the opposite side's fault, then I think the review Judge should grant the review on its merits if he thought that it should be granted; but while that may be a matter of correct practice, I would be sorry to lay it down as a matter of law that the delay must have been explained by affidavit at the time the application for the order for hearing is made, and that the review Judge should be satisfied by affidavits then. I think if satisfied by explanations by the party applying at the time of the hearing that the

delay was not his fault, he can exercise his discretion and grant the review. Therefore if he had granted the review order it is within his jurisdiction.

Then if it is said on the other side:—Well it is your fault, you should have satisfied the Judge when you applied that you accounted for the delay, but have not accounted for it sufficiently, and he could shew there was fraud in it by affidavits, then I think those affidavits could be used before the review Judge after the order for hearing had been obtained, on the ground of fraud or misrepresentation; but in this case that was not done.

It was thought necessary on the part of the parties applying for review to make an explanation when they came to argue, and they did make a most satisfactory explanation according to the affidavit, if that could be read. Mr. Justice Gregory thinks it should not be read. I am of opinion that it could be read; and the fault of the delay lay entirely with the magistrate; he had misrepresented his action to the party who got the judgment and afterwards explained that the reason he did it was because he was urging an execution, and to prevent him getting that he said: I have given over the copy of the proceedings for review; when in point of fact he had not delivered them over, and made it quite clear it was not the fault of the party applying for review, and his only default was that he did not make it known to the review Judge in the first instance. I do not think he was absolutely obliged to do so, but think it would have been better practice if he had; but if the review Judge's jurisdiction was not ousted by that, I think the proceedings are rightly before the Judge and we cannot question the action taken.

MCLEOD, J.:—There are two points taken in this case: 1st. It was objected that Judge Wilson ordered a new trial and gave the plaintiff who got the verdict before the magistrate two months to proceed with a new trial; failing that he ordered the verdict to be reversed and a verdict entered for the defendant. The Court, with the exception of my brother Gregory, all agree that was the correct order; 2nd. It was contended that the review was too late and that the Judge had no jurisdiction as the application was not made within the thirty days allowed by the statute. This latter point was decided in *Lunt v. Kennedy*, ante p. 295.

I agree with the law stated by Mr. Justice Gregory to the extent that there should be a finality about these cases, and therefore there should be affidavits explaining any delay in applying; but in this case, as I understand it, there were affidavits subsequently filed; at all events they were read to this Court, which fully explained the delay, and that, I think, is sufficient, as they do absolutely explain the delay that had taken place. Without these affidavits, I would think that the rule would be absolute.

GREGORY, J.:—This case was brought up by a certiorari to quash an order made by Judge Wilson upon a review. The ground taken was that he had no jurisdiction to hear the matter by reason of the lapse of time between the hearing by the magistrate and his granting the order; and I think that he had no jurisdiction, for the reason that the delay was not accounted for.

It was tried before a justice of the peace for Kent county, on the 26th of August, 1905. The order for review was granted on the 20th of December, 1905, four months all but a few days after judgment. The order, as has been stated by Mr. Justice McLeod, directed a new trial, limiting the time for that, and on failure to bring it on for trial within the time limited before the justice of the peace, the order was that the judgment should be reversed. There was no explanation of the delay whatever given by the affidavit, that is, the affidavit that was first submitted to the Judge to get the order for hearing.

In *Collins v. Vestry of Paddington*, 5 Q. B. D. 368, before the Court of Appeal, Lord Thesiger, at page 381, says: "In the interest of the public, the Court ought to take care that appeals are brought before it in proper time, and as between the parties it has been often remarked in the branch of this Court which sits at Lincoln's Inn, that when a judgment has been pronounced and the time for appeal has elapsed without appeal, the successful party has a vested right to the judgment which ought, except under very special circumstances, to be made effectual." And Wills, J., in the case of *The Queen v. Rupert Kettle*, 17 Q. Q. B. 761, says, at page 764: "There comes a time when everything must be final; when judgment has been given the successful liti-

gant has a right to be protected against the too liberal indulgence of the Court."

This in connection with the other case (*Lunt v. Kennedy*, ante p. 295) brings up the proposition as to whether or not there is any necessity for accounting for the delay, and shewing that it is not the fault of the party seeking review. Here, although four months elapsed, there is no pretence or effort of explaining to the Judge why he comes so late, and the proposition which has been announced by Mr. Justice Hanington, and by the learned Chief Justice, but not so positively, is clearly brought under consideration, as to whether or not it is a matter of any consequence what delays the proceedings getting into the hands of the reviewing party, whether it be his own neglect in calling for them, or perhaps even mere design, or whether it is excusable because of his inability to procure the copy from the magistrate, although diligent, and contrasting this case with the former one of *Lunt v. Kennedy*, where we had the reverse, the mind is naturally drawn to the section and what is and what is not necessary.

I do not understand what will be the conclusion of the matter, but it seems there is an opinion on the part of some of the Judges that it is of no consequence who caused the delay. I cite these cases to shew that where a judgment has been obtained, it has been considered by the Court that there should be some limit and some closing time after which an appeal should not be entertained.

In this case, in the application in this Court there were affidavits read which sought to explain how the delay came about. If those affidavits had been submitted to the Judge by the party seeking the review as part of his explanation on asking for the order for hearing, I am not prepared to say that they might not and would not have been satisfactory; but I do not think they can be read here, and I do not think jurisdiction can be fortified by shewing facts excusing delay not shewn before the reviewing Judge. I disregard those affidavits in dealing with this case, because they were not submitted to the County Court Judge. It was objected that he should not entertain the review after the lapse of the time allowed by the statute. It stands as a delayed case, four months' delay in receiving the proceedings with no satisfactory explanation of the delay.

I also think the order made by the Judge on review was not within his power. He could not, I think, make an order for a new trial, and in the alternative say that if the plaintiff did not bring it on for a new trial in two months there should be a reversal of the judgment and verdict should be entered for the defendant.

I think the rule nisi to quash the order of Judge Wilson should be made absolute.

BARKER, J., took no part.

NEW BRUNSWICK.

TUCK, C.J.

FEBRUARY 12TH, 1907.

IN RE THE FREDERICTON BOOM COMPANY.

Company — Winding-up—Company and Majority of Creditors Desiring Liquidation to take Place under Provincial Act — Insolvency — Boom Company — Shareholders—Double Liability.

Application for a winding-up order, argued before TUCK, C.J., on the 5th February, 1907.

J. J. F. Winslow, for petitioners.

J. H. Barry, K.C., for the company.

J. W. McCready, for a judgment creditor.

A. P. Barnhill, K.C., for shareholders.

TUCK, C.J.:—Jasper A. Winslow and J. J. Fraser Winslow have presented a petition dated the 28th January, 1907, for winding-up the Fredericton Boom Company.

This petition is presented under the provisions of R. S. C. c. 129 and the amending Acts.

On the 5th February, 1907, when this petition was heard before me, the Fredericton Boom Company by their counsel read their petition supported by affidavits praying that an order ought to be made for winding up the company under the provisions of the Provincial Act, C. S. 1903, c. 90, and that a curator might be appointed.

At the same time their counsel asked leave to publish a notice in the Royal Gazette, and to take the other necessary steps required by c. 90, so that in the event of the petition for compulsory winding-up being refused, the company might without loss of time be in a position, at a future named day, to ask for a voluntary winding-up under c. 90.

In an affidavit made by Randolph, the president of the company, he admits that the company has not at the present time any cash or readily available assets with which to pay and satisfy a judgment of the Peoples Bank of New Brunswick, and other outstanding liabilities against it; that whether or not the company is insolvent, within the meaning of R. S. C. c. 129 and amending Acts, he is advised and believes is a question of law, arising upon the facts, rather than upon one fact alone; that the company has sufficient assets which, if sold even at fifty per cent. of their fair present value, and converted into money, would be amply sufficient to pay and satisfy all its present liabilities; and he is advised by counsel and verily believes that the best interests of the shareholders of the company and its creditors would be conserved and promoted by the voluntary winding-up of the said company under the provisions of C. S. 1903, c. 90, rather than by a compulsory winding-up under the provisions of R. S. C. c. 129, and amending Acts.

In another affidavit made by Randolph, as president of the Peoples Bank of New Brunswick, and sworn on the 1st February, 1907, he says that the bank is a creditor of the company for the sum of \$56,812.85, of which sum \$56,625 is included in the amount of a judgment recently recovered by the bank against the company; that he is informed and believes that the liabilities of the company above the amount of said judgment do not exceed the sum of \$2,592.66; and finally he says that the bank is desirous that the company shall be voluntarily wound up.

In the company's petition for voluntary winding-up, to which leave is asked to refer, the provisions of the Act incorporating the company are set forth. It is also therein stated that the nominal capital stock of the company is \$72,000, divided into 720 shares of \$100 each, of which 710 shares are subscribed and 682 shares are fully paid up. The names of the shareholders are given and the stock held by each. It is also stated in the said petition that the costs and charges of conducting the business of the company have greatly increased and the reasons are given therefor; that at the last session of the legislature an application was made for an increase of the tolls, which application was refused; that in recent years the revenues of the company have been insufficient to pay its working expenses, and it has been obliged from time to time to borrow large sums of money from the bank; that the bank has obtained a judgment against the company, which it is unable to pay, except by conversion of its assets; that in addition to what the company owes the bank it owes divers other persons \$2,592.66, which it is unable to pay; that the nominal assets of the company are \$153,209.15, and the liabilities \$59,405.51, leaving a nominal surplus of \$93,803.64.

In the petition the opinion is expressed that the assets upon sale would probably not realize more than one-half of the value placed upon the same; that at a meeting of the shareholders of the company held at Fredericton on the 8th January, 1907, for reasons duly set forth, it was resolved that the directors take the necessary steps to wind up the company, under C. S. 1903, c. 90; and that on the same day the directors made an order to that effect.

The statements made in the petition of the applicants do not differ in regard to these facts in any material respect from the company's petition; but some additional particulars are given in this petition before me in this application. For instance it is stated that for some years past the company has shewn an annual loss; that it has lost thousands of dollars by its operations; that no dividend has been declared by the company since the year 1896, when a dividend of six per centum was paid; that the loss in the year 1905 was in the neighbourhood of \$20,000, and for the year 1906, \$4,000; that down to the time this petition was signed (the

28th of January, 1907), the president of the company had taken no steps for a voluntary winding-up in conformity with the resolution passed at the shareholders' meeting; that the president has admitted to the petitioners and others the inability of the company to pay its debts as they become due; that they have not paid the same; and that the company is in fact insolvent.

From the facts (about which there is no dispute), set forth in both petitions, it is clear that the company must be wound up; the only question is under which Act, the Dominion or Provincial? If I were to act upon my own belief, I would say that it would be cheaper and more beneficial for all interested to have the winding-up done under the Provincial Act rather than under the Act of the Parliament of Canada. But acting within the law, have I any discretion in the matter? In my opinion I have not. If I had, I would say the Provincial Act by all means.

In opposing the prayer of this petition counsel for the company and for the bank say that the company is not insolvent, and secondly that it is not liable to be wound up under the Dominion Act. I think that not only is the company insolvent, but that it comes within the provisions of R. S. C. c. 129. There is still another obvious reason why the Dominion Act must prevail. The company's capital stock is not only impaired, it is all gone. No matter under which Act the winding-up took place, I doubt very much if enough will be realized from the assets to save the stockholders from being called on under the double liability clause in their Act of incorporation.

The company is insolvent because it owes what it cannot pay; it does not meet its payments as they mature; it owes over \$50,000 to the Peoples Bank, advanced from time to time to meet ordinary expenses; it has confessed judgment to the bank for \$56,625; and owes the bank a small sum besides; and there is other indebtedness as already stated. In addition to all this the company's stock is worthless. If this is not insolvency, it would be difficult to say what is.

I am convinced that if the company could at any time have disposed of all its assets, and paid its debts, the stock-

holders would have been rejoiced because they had escaped payment under the double liability clause.

Mr. Barnhill, who appeared as counsel for shareholders as well as for some lumbermen, took another objection, namely, that the assets and franchises of the company could not be sold, except under the authority of an Act of the Legislature. With this last named objection, however, I am not at present concerned, for it does not bear upon my authority to grant a winding-up order. Apart altogether from the question involved in this enquiry, one thing is certain, that irreparable loss will follow unless the necessary steps be taken to keep in effective operation the booms and appliances which the company has hitherto controlled when the lumber begins to run in the river St. John, upon the opening of navigation in the spring of this year.

As to the second objection I have no doubt that a company such as this one is included in the expression "trading company" mentioned in s. 2, s.-s. (c) of R. S. C. c. 129. The words are: "The expression 'trading company' means any company, except a railway or telegraph company, carrying on business similar to that carried on by apothecaries, auctioneers, bankers, brokers, . . . etc., carriers, . . . etc." Boom companies are not mentioned by name, but it would be absurd to hold that they are not included in the words "carrying on business similar," etc. Boom companies are certainly *ejusdem generis*. From the business done by a boom company I think it comes under the designation, "carriers." But whether it does or not the section is broad enough to include this company.

By s. 5 a company is deemed insolvent, "(c) if it exhibits a statement shewing its inability to meet its liabilities." This company did so at its meeting of stockholders on the 8th January, 1907, when it passed a resolution to go into voluntary liquidation. Again insolvency is admitted by the president's affidavit of the 1st February, 1907.

When insolvency is shewn and it is clear that a boom company is liable to be wound up under the provisions of R. S. C. c. 129, it follows that the prayer of this petition must be granted, and that C. S. 1903, c. 90, does not apply.

I have not referred to the cases cited at the argument before me, because in my opinion they do not bear upon the facts of this case.

A winding-up order must be granted.

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NEW BRUNSWICK.

FULL COURT.

FEBRUARY 22ND, 1907.

REX v. McQUEEN: EX PARTE LANDRY.

REX v. McQUEEN: EX PARTE LEGERE.

Intoxicating Liquors—Canada Temperance Act—Magistrate for County Convicting for Offence Committed in City in that County.

Motion to make absolute rules nisi to quash convictions under the Canada Temperance Act, by James McQueen, police magistrate for the County of Westmoreland, argued in Michaelmas Term, 1906, before TUCK, C.J., HANINGTON, LANDRY, BARKER, McLEOD, and GREGORY, JJ.

H. A. Powell, K.C., shewed cause against the orders nisi to quash.

A. I. Trueman, K.C., supported them.

TUCK, C.J.:—The same point arises in both these cases. The defendants were convicted before James McQueen, a police magistrate for the county of Westmoreland, sitting at Shediac in the said county, for the violation of the Canada Temperance Act, and the usual fines were imposed. The offences took place at the city of Moncton in said county.

This is a motion to quash the convictions, and the only point argued was: Had the magistrate sitting at Shediac jurisdiction to try offences committed at the city of Mon-

ton? The contention on the part of the defendants is that he acted wholly without jurisdiction.

In arguing for the motion, defendants' counsel cited Acts of Assembly, 46 V. (1883) c. 37, s. 5; 53 V. (1890) c. 77; and 2 Edw. VII. (1902) c. 11; and also *Ex parte Gallant*, 31 N. B. R. 506.

46 V. c. 37 is "An Act to provide for the appointment of a police magistrate, and to establish a lock-up house in Shediac, Westmoreland county," and s. 5 enacts that "the Lieutenant-Governor-in-Council is hereby authorized to appoint a fit and proper person, resident in the said police district, to be a police or stipendiary magistrate for the said county, with civil jurisdiction within the said parish of Shediac."

39 V. (1876) c. 16, s. 1, authorizes the appointment of a fit and proper person, resident in the town or parish of Moncton, to be a district, police, or stipendiary magistrate for the county of Westmoreland; and provision is also made in the same section for the appointment of a magistrate for the parish of Salisbury.

53 V. c. 77 amends s. 1 of the Act of 1876 as regards the police magistrate of the parish of Salisbury, and gives him jurisdiction over the said county.

All that *Ex parte Gallant*, on the point here involved, decides, is that the district, police, or stipendiary magistrate, under 39 V. C. 16, has jurisdiction to try offences against the Canada Temperance Act committed in Moncton. On the same principle James McQueen, a police magistrate for the county, residing at Shediac, would have jurisdiction to try offences against the Canada Temperance Act committed in Moncton. But Mr. Trueman for the defendants contends that the jurisdiction of the Shediac magistrate in relation to the City of Moncton is taken away by 2 Edw. VII. c. 11. In effect, that the last named Act repeals former Acts. By this Act it is provided that every police or stipendiary magistrate, whether restricted by the terms of the Act to a certain parish or not, shall have jurisdiction in and for the county within which is situated the parish for which he is appointed over all complaints, etc. But at the end of the Act there are the following words: "Provided, however, that nothing herein contained shall be construed or held to give to any such police or stipendiary magistrate appointed for a parish

jurisdiction over offences committed within the limits of any city or any incorporated town."

The judgment in *Rex v. Cahill; Ex parte Tait*, 37 N. B. R. 18, lends no assistance to a solution of the question raised in this matter. In that case, Barker, J., in delivering the judgment of the Court, does say that the appointment of stipendiary magistrates for parishes, as distinct from counties, is distinctly recognized by 2 Edw. VII., c. 11, and all doubts as to their jurisdiction are thereby removed. That is entirely true, but that does not touch the point whether or not, by c. 11 of 2 Edw. VII. the jurisdiction of a police or stipendiary magistrate appointed for a county is taken away when the offence charged is committed within the limits of any city or incorporated town. It is clear by the very words of the Act that such a magistrate appointed for a parish has no jurisdiction over offences committed within the limits of any city, etc. But the Act is silent as to a stipendiary magistrate appointed for a county. When I granted the orders nisi in these cases I thought McQueen had no jurisdiction to convict; but upon further consideration I incline to the opinion that the Legislature meant only to take away in the cases named the jurisdiction of magistrates appointed for a parish, and to leave the jurisdiction of those appointed for a county the same as it was before the passing of the Act. And possibly for this reason, that a county would include a city or incorporated town, and a parish would not.

At all events I shall follow the language of the Act, and in doing so decide that these orders nisi to quash must be discharged.

HANINGTON, J.:—There was an application in habeas corpus before me, on behalf of one Wilbur, heard in July at Dorchester. I granted the order nisi and heard the argument on the same point now before the Court in these cases; and I then determined that the police magistrate had jurisdiction and discharged the order nisi for habeas corpus. Therefore I now agree in these cases.

LANDRY, J., concurred.

BARKER, McLEOD, and GREGORY, JJ., took no part.

NEW BRUNSWICK.

FULL COURT.

FEBRUARY 22ND, 1907.

WILKINS v. WALLACE.

Contract—Illegality—Purchase of Intoxicating Liquors for Sale in Place where Canada Temperance Act is in Force—Purchase by Agent—Refusal of Principal to Pay.

Motion by plaintiff to increase verdict at trial, argued before TUCK, C.J., HANINGTON, LANDRY, McLEOD, and GREGORY, JJ., November 12th, 1906.

M. G. Teed, K.C., for defendant.

E. P. Raymond, for plaintiff.

TUCK, C.J.:—This action was tried at St. John, before Mr. Justice McLeod without a jury, when he ordered a verdict to be entered for the plaintiff for \$152.41. This is an application to increase the verdict by the sum of \$480.60, for the reasons stated in the notice of motion, that the verdict is against evidence and against law and evidence.

I think the application must be refused, and I will state shortly my reasons. This action is on an agreement made in writing on the 2nd March, 1904. By this agreement the plaintiff covenanted that he would enter into the service and employment of the defendant as manager of her hotel at Moncton for the period of one year from the 1st April, 1904; that he was to keep the books of account and perform the other necessary duties which might devolve upon him as manager of the hotel. For this service the defendant agreed to furnish him with board and lodging, to pay him \$10 a week, and that he should have one-half of the net profits accruing from the hotel business. That is the substance of the agreement. There are other provisions as to the renewal of the service, and the manner in which the net profits were to be ascertained. For the purposes of this case it is not necessary that the agreement should be set out in full. There was some claim that this agreement had never been acted upon, but that another agreement, an oral one, had been made in substitution of it. But the learned trial Judge found that there had been no such other agreement, and with that finding I concur.

The plaintiff went into the defendant's employment on the 1st April, 1904. There was some dispute as to the amount of wages due, but that was dealt with by the learned Judge at the trial; and I think as to this first part of the claim and to all other items in this part, he arrived at a correct conclusion and assessed the proper amount for damages.

The second part of the claim, as to which the real dispute in this suit arises, is for a quantity of liquor purchased by the plaintiff from John O'Regan in the City of St. John. The liquors sold were charged to him, and he claims the liquors were purchased by him under an arrangement with the defendant. The goods were charged to the plaintiff, as he says by an understanding, with Mrs. Wallace. This would be verbal and outside the written agreement.

O'Regan drew bills on the plaintiff for goods sold; he accepted; and part of the amount charged to the plaintiff was paid by the defendant. I think from the evidence that the plaintiff came to St. John, and purchased the liquors from O'Regan, at the request of the defendant, although they were charged to the plaintiff who accepted drafts for the purchase money, which are still unpaid. The liquors so purchased were sent to the defendant's hotel at Moncton. They were bought for that purpose, and were sold at the defendant's hotel in Moncton.

At the time the liquors were so purchased and sold at Mrs. Wallace's hotel, the Canada Temperance Act was in force in the city of Moncton, and selling intoxicating liquors there was in violation of the law.

It is said that O'Regan did not know that the Canada Temperance Act was in force in the City of Moncton. I think that makes no difference as to the determination of this case. But O'Regan did know that the liquors were intoxicating and that they were shipped to Mrs. Wallace's hotel in Moncton for the purpose of being sold there.

There is not however a shadow of doubt that both the plaintiff and defendant knew that the Canada Temperance Act was in operation in Moncton, and that selling intoxicating liquor there was contrary to law. It is clear to my mind that there was an arrangement between the plaintiff and defendant, that the plaintiff should come to St. John and buy the liquors for her hotel; that they should be shipped to Moncton, there to be sold illegally at the said hotel.

The learned trial Judge held, and rightly I think, that the plaintiff could not recover from Mrs. Wallace, the defendant, the price of intoxicating liquors illegally sold.

Leave was reserved for the plaintiff to move to increase the verdict by \$480.60, being the amount of O'Regan's account, and motion was made accordingly. But I think he has failed to make out a case.

As regards the illegality the plaintiff and defendant are *in pari delicto*. If Wilkins purchased the liquors for himself, then he sold them to Mrs. Wallace and cannot recover. If he acted as her agent for an illegal purpose, he is equally guilty with Mrs. Wallace and cannot recover. They are leagued together and the act of the one is the act of the other.

If authority were required upon the main point as to the effect of an illegal sale, we have it in our Court, in *Furlong v. Russell*, 24 N. B. R. 481, where it is held that a person who sells spirituous liquors knowing that the purchaser intends to sell such liquors in violation of law where the Canada Temperance Act is in force, cannot recover the price of the liquors. In *McKinnell v. Robinson*, 3 M. & W. 434, it is held that money lent for the purpose of gaming, and of playing with it at an illegal game, such as hazard, cannot be recovered back. See also *Clark v. Hagar*, 22 S. C. R. 510; *Pearce v. Brooks*, L. R. 1 Exch. 213; and *Cannon v. Bryce*, 3 B. & A. 179.

The cases cited by Mr. Raymond for the motion—*Bigelow v. Craigelachie Distillery Co.*, 37 S. C. R. 55; *Rosewarne v. Billing*, 33 L. J. C. P. 55; *In re Lister*, 8 Ch. D. 754; and *Read v. Anderson*, 10 Q. B. D. 100, are not in contravention of the principle of *Furlong v. Russell* and the other cases.

Then in respect of the liability of a principal in a transaction such as this one the authorities are numerous. See *Ewell's Evans on Agency*, 464 and 473; *Brown v. Moore*, 32 S. C. R. 93; *Shackell v. Rosier*, 2 Bing. N. C. 634; and *Toplis v. Grane*, 5 Bing. N. C. 636.

The defence is not in my opinion a meritorious one, but in law it must prevail. The application to increase the verdict is refused.

HANINGTON, LANDRY, and McLEOD, JJ., concurred.

GREGORY, J., took no part.

NEW BRUNSWICK.

FULL COURT.

FEBRUARY 22ND, 1907.

POITRAS v. PELLETIER.

Conversion — Plaintiff Claiming under Fraudulent Bill of Sale—Findings of Jury—New Trial.

Appeal by the defendant from the judgment of Carleton, Co.J., argued in Michaelmas Term, 1906, before TUCK, C.J., HANINGTON, LANDRY, McLEOD, and GREGORY. JJ.

A. B. Connell, K.C., for appellant.

T. M. Jones, for respondent.

TUCK, C.J.:—This was an action brought in the Madawaska County Court by Henry Pelletier (the respondent in this Court, against Gabriel Poitras (the appellant) for the conversion of a certain top buggy included in a bill of sale from one Thomas Pelletier to the said plaintiff Henry Pelletier, a brother of Thomas. At the trial before Judge Carleton, and a jury, a verdict was entered for the defendant upon the answers to questions left to the jury. Afterwards on application being made to Judge Carleton, he gave judgment setting aside this verdict and ordering a new trial, from which judgment an appeal is taken to this Court.

The evidence shows that about the 10th June, 1903, Thomas Pelletier purchased from the McLaughlin Carriage Company, through the appellant Gabriel Poitras their agent, a top buggy, and gave three promissory notes for the price, namely, ninety dollars. The first of these notes was paid at maturity. The second note was not paid by the maker Thomas Pelletier, but the appellant, who was guarantor to the company, paid it, and took from Thomas a new note, which was discounted at a bank. This note was not paid at maturity and is still unpaid. The third of the original notes given for the buggy was not paid by Thomas Pelletier, but was endorsed by the company to the appellant, who is the holder thereof.

On the 30th May, 1905, Thomas Pelletier gave an absolute bill of sale of this buggy and his other property to the respondent (who is his brother), for an alleged consideration of \$700—being an old debt of \$325 and a further advance

or payment of \$375 to be made. This latter amount was claimed to have been paid after the taking of the buggy by Poitras and after the commencement of this action.

The jury did not believe that either amount had ever been actually paid by Henry Pelletier to Thomas; that there was no debt; money may have been passed from hand to hand, but it was all a sham, a mere idle action, never meant to have any force.

This bill of sale from Thomas to Henry was filed the 1st June, 1905. Henry, the plaintiff, never took possession of the property mentioned therein, and none of it was ever removed from Thomas Pelletier's place of residence, where (with the exception of the buggy) it still was at the time of trial. It was claimed to have been left there under a lease to Thomas's wife.

On the 3rd June, 1905, Thomas gave a lien note on the buggy in question to the appellant Poitras for \$28, being the amount of the second note which had been taken up by Poitras. The lien clause was in the usual form; that it was given as security for the payment of a top buggy, etc. I need not set it out in full.

This lien note not having been paid at maturity, the appellant, acting under the terms of the note, took possession of the buggy about the 3rd July, 1905; and this action was brought to recover its value.

In answer to questions, the jury found that when the bill of sale was made Thomas Pelletier was not indebted to Henry in the sum of \$325; that Henry promised to pay Thomas the balance, \$375, but that he never paid it; that the money was simply passed from one hand to the other, but not as a payment; that the transaction was not in good faith; that it was fraudulent; that this bill of sale was made to defeat, delay and defraud the defendant and other creditors of Thomas Pelletier.

I fail to see how the jury could have found otherwise. No one who reads the evidence ought to arrive at any other conclusion than that the giving of the bill of sale was a mere sham; that there was no debt from Thomas to Henry; and that the \$375, promised to be paid, was never paid by Henry to Thomas. I have not a particle of doubt that these two brothers were in collusion to cheat the creditors of Thomas.

I am amazed that right in the teeth of the jury's findings, amply warranted by the evidence, the Judge of the

Madawaska County Court set aside the verdict for defendant and ordered a new trial. I have read the reasons which the Judge gives for this decision and I think they show conclusively that the verdict ought to stand. With the Judge's law, as set out in the return, I do not agree.

The case must go back to the County Court of Madawaska, with directions to the Judge to restore the verdict entered at the trial. The respondent must pay the costs of this appeal.

HANINGTON, LANDRY, and McLEOD, JJ., concurred.

GREGORY, J., took no part.

NEW BRUNSWICK.

FULL COURT.

FEBRUARY 22ND, 1907.

WILSON v. CLARK.

Work and Labour—Contract to Bore Holes for Iron Work.

An appeal by the defendants from the judgment of HANINGTON, J., ante p. 347, was argued on the 14th February, 1907, before TUCK, C.J., HANINGTON, LANDRY, BARKER, and McLEOD, JJ.

H. A. McKeown, K.C., for defendants.

D. Mullin, K.C., for plaintiffs.

The judgment of the Court was delivered by TUCK, C.J.:—This was an action tried before Mr. Justice Hanington without a jury at St. John at the last circuit held there.

The defendants, who had a contract with the Dominion Government for the construction of a work in St. John for the Intercolonial Railway, entered into a sub-contract with the plaintiffs for the punching or boring of the holes in the plates of iron required for the work; and the real contest between the parties was whether the plaintiffs were to be paid for each hole punched in each plate, or whether, where the plates were welded together, the hole through which the rivet went in the plates so welded constituted one hole.

The claim on the part of the defendants was, (1) that the plaintiffs are entitled to be paid only for one hole, though it may pass through a number of plates welded or bolted together, while the plaintiffs claim they are entitled to be paid for each hole through each plate; and (2) that there is a custom in the city of St. John whereby the plaintiffs would only be entitled "for payment for one hole" through the aggregate number of plates through which the riveting or bolting was done.

We think the plaintiffs' construction of the contract is the correct one, and that there is no such custom as contended for established; at all events, there was no such custom brought to the knowledge of the plaintiffs, and therefore they were not bound by it even if it existed. The Court has come to the conclusion that the verdict was right.

PRINCE EDWARD ISLAND.

HODGSON, J.

FEBRUARY 23RD, 1907.

IN RE McMURRER (No. 2).

Habeas Corpus — Warrant Addressed to one of a Class of which Prosecutor is a Member—Not Void if Prosecutor Took no Part in Arrest.

E. O. Brown, for prisoner.

W. A. Weeks, contra.

HODGSON, J.:—This is another habeas corpus which was allowed by me and ordered to be sealed, in which the prisoner's counsel has exercised his ingenuity in a further endeavour to free his client from imprisonment. (For the first application, see ante p. 436.)

Several grounds were urged to which I do not refer, as I do not think there is anything in them; but I was pressed with a decision of Palmer, Chief Justice of the Supreme Court of this Province, given in *In re Trainor* on the 17th December, 1886.

In that case there had been a conviction against Trainor under the Canada Temperance Act. The city marshal had been the prosecutor, and the commitment had been directed to "the city marshal and other peace officers of the city

of Charlottetown," directing them to arrest Trainor and convey him to jail. It appeared that the city marshal was present at the arrest and was directing a policeman named McGonnell who was acting under him. The prisoner swore that the city marshal laid his hand upon him, saying, "You are my prisoner." This was denied, but both agreed that as the prisoner was going out of his house, the marshal stood before him with extended arms barring his way, thus enabling McGonnell to apprehend him.

The Chief Justice held that the commitment could not be directed to the prosecutor; that it was illegal for him to act under a warrant so directed; and he discharged the prisoner.

This case materially differs from that one. Here, the warrant was directed "To all or any of the constables or other peace officers of the county of Queen's county and to the keeper of the common jail of Queen's county;" and while it is admitted that Jenkins, the prosecutor, did not interfere with the arrest, and had nothing to do with it, still he was proved to be a justice of the peace; and as every justice of the peace is a "peace officer," therefore it was urged that as he was one of a class to whom the warrant was directed, such warrant, under Chief Justice Palmer's decision, was void.

It is true that every justice of the peace is a "peace officer" at common law and also under the Criminal Code, s. 2, s.-s. 26, but I never heard of one executing a warrant or a commitment. When Chief Justice Palmer declared the warrant to be "illegal," I think he meant that being directed to and executed by the prosecutor, it did not operate as a protection to him, and that any action by him against the prisoner was illegal under such warrant.

Suppose that after the issuing of the commitment, a prosecutor had been appointed a justice of the peace, and that without any interference by him, a constable or the sheriff had arrested the defendant and put him in jail, can it be contended that the commitment became illegal and void and that the prisoner must be discharged out of custody? Yet this is the effect of the prisoner's argument.

I granted this habeas corpus out of deference to the decision of Chief Justice Palmer in Trainor's case, but the present one is clearly distinguishable, and the prisoner must be remanded.

NOVA SCOTIA.

FULL COURT.

MARCH 16TH, 1907.

HART v. CITY OF HALIFAX.

Municipal Corporations—Illegal Expenditure of Municipal Funds—Ratepayer Entitled to Maintain Action—Attorney-General's Joinder not Essential.

Appeal by the plaintiff from the judgment of MEAGHER, J., reported ante pp. 118, 158, argued before GRAHAM, E.J., RUSSELL and LONGLEY, JJ., on the 23rd January, 1907.

E. P. Allison, for plaintiff.

F. H. Bell, for defendants.

GRAHAM, E.J.:—This is an action brought by the plaintiff, who sues on behalf of himself and all other ratepayers of the city of Halifax other than the two defendants (because the city council has refused to sue or to allow the corporate name to be used in a suit) to recover for the defendants, the city of Halifax, against the defendants McIlreith and Doane, certain money which it is claimed should be repaid to the city because it was, as is contended, received by them illegally or without statutory authority from city funds. There is also asked for a declaration that the payments were illegal. No relief is asked against the city corporation.

The action has been dismissed on the ground that the plaintiff could not maintain it.

These defendants are respectively the mayor and the city engineer, and the money was paid to them for personal expenses incurred by them in attending a convention of the Union of Canadian Municipalities, held at the city of Winnipeg, in the Province of Manitoba, in July, 1905.

The learned Judge has found this: "The mayor's disbursements, \$231, were paid out of a contingent fund without having been passed or approved by the council or any committee of that body. The engineer's account was passed by the council and paid out of the water maintenance account. It amounted to \$111.40. The plaintiff, a ratepayer, seeks in this action against the city and the officials above named, a declaration that such payments were illegal, and

claims repayment thereof with interest. He sues on his own behalf as well as on behalf of all the ratepayers other than the mayor and engineer. Before action he sought leave from the city to sue in its name, which was refused."

The first question to be determined is whether the city of Halifax could maintain an action in its corporate name to recover the money. The learned trial Judge has decided that it could do so, and, further, he says: "The money being the property of the city, the Attorney-General would neither be a necessary or a proper party to a suit by the city for its recovery." I agree with him. It would be a strange thing if this corporation having express power to sue and be sued, could not maintain an action for money supposed to be due to it.

Suppose that a large taxpayer like the Halifax Electric Tram Company would not pay its fixed tax, or a contractor for cement or paving violated his contract, or one of the earning committees of the council, like the public gardens committee, should not pay over its receipts, or one of the special committees, like the committee on works, or one of the boards, should hold back moneys or apply them to its own private use, I think it is very clear that the city could maintain an action to enforce its proprietary rights. *Bowes v. Toronto*, 8 Moo. P. C. 463 (from Ontario) is that case. Then I agree that if the corporation could maintain the action the ratepayers or some for all could not do so.

But suppose that the city council, through sympathy, say, with one of its large committees, will not sue its members, and that all of the ratepayers wish to have that money recovered, because it all comes out of the rates, or makes a deficiency which will have to be made good by rates and taxing them. There are eighteen aldermen, six going out of office in May of each year, and six are then elected to the vacancies, and it may take nearly two years to get a majority and then to get a new council.

Have not the ratepayers the right, the council refusing the use of the corporate name, to make the city a defendant and the persons against whom the recovery is sought, and to pray that the money may be paid by those defendants who have the money to the defendant, the city?

Of course there is a rule, O. 16, r. 9, containing the well established practice to the effect that where parties having the same interest are numerous, one may sue on behalf of

himself and the others. This is everyday practice in the case of a commercial corporation and an *ultra vires* transaction (the directors refusing to allow the corporate name to be used), for some of the shareholders to maintain the action on behalf of themselves and other shareholders, the company to receive the money: *Spoke v. Grosvenor Hotel Co.*, [1897] 2 Q. B. at p. 128, Chitty, L.J.; *Burland v. Earle*, [1902] A. C. at p. 93; *Towers v. African Tug Co.*, [1904] 1 Ch. at p. 571. *Bowes v. Toronto* (*Patterson v. Bowes*), 4 Grant 170, was launched in that shape and it was amended afterwards by making the city of Toronto, which had been a defendant, a plaintiff, but not I think because that course was indispensable. Eminent Chancery judges decided that it was not and there are many Ontario cases which follow that idea.

The simple question is whether that practice is available in the case of municipal corporations, and to the ratepayers in that case, as it is to the shareholders in the other case.

I think it is not because the council refuses to have the name of the corporation used that you have to ask the Attorney-General to sue. It is because in certain cases, say of public nuisances, the corporation having no special proprietary right involved or of public charters, which of course the Attorney-General is concerned with; or of breaches of public trusts; or of violation of a public statute where, again, the corporation having no special proprietary interest, there must be a suit by the Attorney-General. And if there is a proprietary right the corporation may sue alone. And where the municipal corporation has its proprietary right to maintain, and there is the public right as well, then it is usual to join both complaints and make the Attorney-General and the corporation parties. And it is a prudent course to pursue; it is really having two strings to the bow. Because often the Attorney-General may have a ground for supporting the proprietary right as well as the public right, whereas the corporation is not equal to both positions. Then, when the council of the corporation refuses to sue, is the Attorney-General the only one who can sue? Perhaps if all the ratepayers were concerned in the illegality complained of it might be so. But I cannot see why the ratepayers cannot represent their own right to have money paid back to the corporation in ease of the rates quite as well as the Attorney-General could represent their rights

to have the money restored to the corporation. They have a direct pecuniary interest on account of the rates apart from the interest of the Attorney-General to see that statutory provisions relating to funds of a municipal corporation are complied with. No doubt the power of the Attorney-General is very large in bringing actions, but there are limits to it. I have not seen it stated that whenever the council of the corporation refuses to bring an action that this of itself gives the Attorney-General the right to file an information. I think that ratepayers may succeed in carrying on the action even when his right does not exist. Suppose that the commonest kind of a corporate right of a municipal corporation required to be enforced by action; one of its officers had overdrawn, and an action was necessary on the fidelity bond; or some one owed it for the products of its prison or poor-house work; or another municipality owed it, and the council refused to bring an action. Now these are hardly public matters and the Attorney-General has little concern in them. It is clear he may refuse, and he may not wish to lend his name to one side of a paltry squabble. For our country, where party politics are carried into the municipal institutions, is it better to say once for all that the ratepayers of a little town can only come to the Court through the Attorney-General? I think it is not compulsory to go to the Attorney-General, and no English case is cited which shows that in such a case the ratepayers have not a right to sue. Suppose the Attorney-General refuses to lend his name, then you may make him a defendant perhaps, but you have no one for plaintiff.

Then there are other smaller municipal corporations such as the trustees of a school section, the overseers of a poor district, and some of the city boards. If these refuse to carry out the behests of the ratepayers and some remedy is required, must the ratepayers go to the Attorney-General to have an action brought?

There is a stream of Ontario decisions in favour of the right of the ratepayers to sue in this way. There are also decisions in the other provinces. Our own unreported decisions referred to in the judgment are not in point, perhaps with one exception, *Stairs v. Town of Dartmouth*, and there, we were told on the argument, the plaintiff had been successful. I would follow the Ontario decisions — not of course against any English decisions or dicta—but I think

they favour the same view, and therefore I do not cite the Ontario cases.

The case of *Green v. Corporation of Avon*, 29 Beav. 144, was the case principally relied on for the defendants.

That was the case of one of the burgesses suing. It was not brought on behalf of himself and the other burgesses. He set up merely his corporate right to sue as senior burgess. He alleged no interest that was not common to the other burgesses. And there had been an express public trust created for the town and its inhabitants upon which the property involved was held, and he alleged no special interest in that matter.

Let us look at the English cases which favour the view (1) that ratepayers or persons in a similar position to ratepayers may sue, and (2) that the Attorney-General need not sue in certain cases.

In *Blackham v. Warden and Society of Sutton Coldfield* (reported anonymous), 1 C. n. Cases 269, it appeared that the inhabitants of Sutton Coldfield were incorporated, and the manor and park granted to them in fee by the name of the warden and assistants and the grant was made to them. And it appeared by the grant that the same was made for the benefit of the inhabitants for ease of taxes and relief of the poor. In a former suit in the Star Chamber, it had been decreed that no further enclosure should be made without consent of the major part of the inhabitants. In King Charles I. time some of the principal of the inhabitants, Pudsey and others, took a new charter leaving out the inhabitants; "and now the warden and twenty-three more made leases and enclosures without consent of the major part. And the plaintiff, an inhabitant, on behalf of himself and the rest of the inhabitants do complain. And the Lork Keeper decreed against the new leases and enclosures and that no such should be without the consent of the major part. And on re-hearing confirmed the decree, for though the administration was in the twenty-four, yet the benefit was for the inhabitants in general. But it was pressed much that the twenty-four were the corporation and the interest in them, and they might alien the estate, and a fortiori lease and inclose, and it would breed contention and confusion if that the multitude must intermeddle."

In *Attorney-General v. Helier*, 2 S. & S. 75, there was an information on the part of the Attorney-General joined

with a bill of the plaintiffs on behalf of themselves and all the other tenants, etc., of premises in Great Bolton. Sir John Leach, V.-C., said: "To this bill the defendants have put in a general demurrer, and the first point made by them is that the plaintiffs to the bill have not a right to sue on behalf of all other persons on whom the rate in question is assessed." Then he refers to a case relied on and continues: "The principle of that case has no application here. The object of the bill is to avoid the payment of the assessment in question, and every individual assessed had in that respect one common interest."

Later he said: "But where an Act of parliament passes for paving, lighting, cleansing and improving a town to be paid for wholly by rates or assessments to be levied upon the inhabitants of that town, the funds so raised being in no sense derived from bounty or charity in the most extensive sense of that word, are not charitable funds to be administered by this court."

That observation was referred to afterwards by Lord Eldon in *Attorney-General v. Dublin*, 1 Bligh N. S. 337, who held that a public trust would justify the joining of the Attorney-General.

In *Bromley v. Smith*, 1 Sim. 8, a treasurer of the rates had paid out of the funds a sum of money in discharge of the costs of an action of libel recovered against his predecessor in office by a third person. The bill was filed by nine persons who were householders and parishioners within the borough of Stafford, on behalf of themselves and all other the householders being parishioners within the borough, except the treasurer and the ex-treasurer. These householders were entitled to rights of common in certain waste lands in the borough, and they had to do with the cultivation and management of them, and they had the power to make regulations and to raise money by rates on the occupiers. The Vice-Chancellor held as follows: "Where a matter is necessarily injurious to the common right, the majority of the persons interested can neither excuse the wrong nor deprive all other parties of their remedy by suit. The Attorney-General may file an information in a case like this in respect of the public nature of the right, and the proceeding must be by the Attorney-General where all persons interested are parties to the

abuse; but where this not the case, I am not aware of any principle or authority which makes it necessary that he should be before the Court."

In *Stockport District Waterworks v. Mayor of Manchester*, 9 Jur. N. S. 267, where the defendants were proposing to supply water outside of their own limits and a competing company filed a bill to restrain such a proceeding, Lord Westbury allowed a demurrer; but he said: "If I had here a party who had a right to restrain the Manchester corporation within its proper limits, as for example the ratepayers who were interested in having the water at the lowest amount and in having the abundance of a certain supply, or if . . . I had the Attorney-General here as an informant . . . I should probably not hesitate to restrain the corporation of Manchester from carrying into effect the agreement," etc.

Coming to later times there is the case of *Prestney v. Mayor and Corporation of Colchester*, 21 Ch. D. 111, where the action was by some on behalf of all the freemen of a borough to have a declaration that the corporation held certain properties only on trust for the freemen of the borough, and it was held that there need not be an information by the Attorney-General as the freemen had a special interest.

In *Attorney-General v. London County Council*, [1901] 1 Ch. 781, afterwards affirmed in the House of Lords, the plaintiffs, other than the Attorney-General, were omnibus proprietors and ratepayers in the county of London, and an injunction was asked to restrain the county council from running omnibusses, it being contended that it was ultra vires. Rigby, L.J., said: "Then it was said that the Attorney-General is here suing at the relation of rival traders or companies, and that there is not sufficient public benefit shewn to arise from the action which is brought in his name to justify it."

After expressing an opinion adversely to the contention he continued: "But in this case it is not really necessary to go into that question for the relators are also plaintiffs. Not only are they plaintiffs; but they are also ratepayers in the county of London. And I think therefore there can be no doubt whatever that as a combination of what used to be called information and bill the action is properly constituted, and the case made against the London County

Council properly raised. I do not at all accede to a suggestion made by Mr. Macnaghten that these relators must necessarily be plaintiffs, and that you cannot as a rule have an information without the relators being plaintiffs, for that is not the rule and never was. However, as a matter of fact, these relators are also plaintiffs, and are therefore absolved from any minute enquiry as to the degree of public benefit that may justify the Attorney-General in bringing the action."

Dealing with the necessity of proceeding in the name of the Attorney-General or of having him joined as a plaintiff, Buckley, J., has formulated a good working rule.

In *Boyce v. Paddington Borough Council*, [1903] 1 Ch. 110, Buckley, J., said: "A plaintiff can sue without joining the Attorney-General in two cases: first, where the interference with the public right is such that some private right of his is at the same time interfered with; and, secondly, when no private right is interfered with, but the plaintiff in respect of his public right suffers special damage peculiar to himself from the interference with the public right."

This applies to municipal corporations and their proprietary rights as well as to individuals.

In *Mayor, etc., of Wednesbury v. Lodge Holes Colliery Co.*, [1907] 1 K. B. 78, which was an action instituted for damages in respect to a subsidence of land beneath one of its highways, a nuisance in fact, the corporation having expended money to restore the road, it was held that the municipal corporation had a sufficient property interest to maintain the action without joining with it an information by the Attorney-General in respect to the public nuisance.

But to shew that there may be a misjoinder of the Attorney-General, limitless as his powers are, I cite an old case. In *Attorney-General v. Moses*, 2 Madd. 294, there was an information and a bill to set aside three leases, one for 999 years and two for 1,000 years, granted by a vicar and vestrymen under an unlimited power to lease given by an Act of parliament. The Vice-Chancellor said: "The first point to be considered is whether this is a proper case for an information and bill. It is an assertion of a mere private right of a vicar who is calling for the restoration of part of his glebe. What has the Attorney-General to do with such a claim? . . . In this case the vicar might alone have

filed a bill. The King or his Attorney-General has no other interest in a suit like the present than that of vindicating the rights of the church.

In the case of *Devenport Corporation v. Tozer*, [1903] 1 Ch. 759, the corporation was putting forward the public wrong only and not its own special right, if it had any, to enforce certain by-laws: see per Cotton, L.J., p. 762.

- In this case I think that the corporation has a special interest in the money sought to be recovered, and that it would have the right to sue for it; and that the ratepayers, the council having refused to bring an action in the name of the corporation, or to allow the name to be used, have the right to sue in the interest of the corporation.

Where the corporation could sue if it would without the Attorney-General joining in the complaint, the ratepayers can sue without him.

Then, supposing that the action is properly framed and in the same plight as if the corporation of the city was a plaintiff, the defendants contend that the city could not succeed because it was a party to the illegality. But that point has also been dealt with. There is a distinction between the corporation and the council, the members of which are but the agents of the corporation. If there was no statutory or legal authority for the act complained of, the corporation (it may be when under the management of a council of a different mind or when the ratepayers having an interest in the matter have a right to speak for it) is not bound by the act of its agent, and that act may be repudiated.

In *Attorney-General v. Wilson*, 1 Cr. & Ph. 1 (an information and bill), Cottenham, L.C., at p. 43, says: "But it was said that such relief cannot be given in a suit in which the corporation are plaintiffs, because the acts complained of were acts of the corporation, and a cestui que trust cannot complain of a breach of trust to which he was a party. This objection was ingeniously argued, but it has no foundation to support it. What the present plaintiffs, the corporation, complain of is that certain persons, members of the corporation at a former time, fraudulently and illegally used the power and authority of the corporation for the purpose of depriving it of property to which it was by law entitled. Is it to be said that the corporation is therefore without remedy? It is true that in future all such property being in

trust for the benefit of the public, the Attorney-General may assert the right of the public in an information, but if before the Act passed a corporation might in a proper case institute a suit for the purpose of setting aside transactions fraudulent against it, though carried into effect in the name of the corporation, that right cannot be affected by the Attorney-General having also a power to complain of the transaction. In the great majority of suits instituted in this Court, for the purpose of rescinding transactions, it is the act of the plaintiff himself which he seeks to rescind. He says: 'The act was mine, but it arose from the fraud or other misconduct of those who then had the management of my affairs.' Why may not a corporation, upon the same ground, have the same relief? Why are they alone to be denied the exercise of this most important jurisdiction of this Court? Certainly not because their affairs do not require it. The true way of viewing this is to consider the members of the governing body of the corporation as its agents, bound to exercise its functions for the purposes for which they were given and to protect its interests and property; and if such agents exercise those functions for the purpose of injuring its interests and alienating its property, shall the corporation be estopped in this Court from complaining because the act done was ostensibly an act of the corporation?"

Then it was contended that this expenditure was incidental to expenditure authorized by provisions of the City Act. I agree with the trial Judge that there is no provision sufficiently comprehensive to embrace it.

The learned counsel further contended that this was a transaction which was merely *ultra vires* the statutes of the corporation, and that the money having been paid over and the transaction completed, it could not be recovered back. And he cited Brice on *Ultra Vires*, 696.

I think this argument in respect to the mayor, who is a defendant, is untenable. He is a member of the council. He must be held to have had notice that the statute did not permit the expenditure; that there was no appropriation of funds for that purpose if the statute had permitted such an appropriation. His duty was to prevent the payment and he cannot say the transaction is completed. He would after repayment be in no worse position than he was before the money was paid to him.

The defendant Doane, although in the position of city engineer, is not a member of the council. He is required by statute "to perform such duties as he shall be instructed and directed by the board of commissioners of city works to perform."

And having been so instructed to go to Winnipeg, and having done so, for general purposes in the interest of the city, and the payment of the expenses having been authorized by the council, he is not, I think, required to know that the city charter and the ordinances, which are not public law, did not allow the payment to be made: *Cooper v. Phibbs*, L. R. 2 H. L. 170, per Lord Westbury. And he was entitled to presume that every ordinance which could have been made, and one might have been made, and every official act or resolution which could have been taken to make the payment legal, had transpired and was in force. The distinction is too fine for an ordinary layman. The city may at great expense acquire a fire engine, a snow plow, cement, a new kind of paving, or some such thing, and as incidental to that expenditure it might instruct the engineer to go to another city to ascertain how that thing or a similar thing works, and indeed to take means to acquire it and to pay his expenses, and that possibly would be a lawful subject for expenditure out of the city funds. But if he goes to another city for general purposes to meet other engineers and city officials to discuss and find out the best things generally, and perhaps one very good thing for the use of the city, and he performs that mission and the city gets the benefit of it, his expenses are not to be a lawful subject of expenditure. I think that an officer cannot be fairly held to such fine distinctions in obeying instructions. Some one else may be liable. I say nothing about that. In my opinion that transaction is completed. And having acquired the money in repayment of his expenses without notice, I think that no implied contract has arisen to repay it.

The appeal as against Doane must be dismissed, and with costs. In respect to the other defendant, it must be allowed, and there must be a judgment directing the repayment by him of the small sum claimed to the city of Halifax, its officer, the city treasurer, giving him a receipt for the same. The plaintiff to have the costs.

I quite agree that the law should have made, as it now does make, provision for an expenditure of the kind made

by the mayor, and I have no sympathy with the notion of obtaining direct benefit for the city by reason of such a visit on the part of the mayor at his own private expense, and I am glad he is to be indemnified by Acts of 1906 c. 61, s. 17, against this action out of city funds.

But there are principles involved which I think are of greater importance than the subject of this case. One is the right of a corporation to maintain its own action when it has a corporation interest at stake without the concurrence of the Attorney-General, which might be arbitrarily refused, and the other is the right of the ratepayers or some on behalf of all, if the city council refuses to have the corporate name used, to proceed with their own action on behalf of the city. This is altogether apart from the principle still more important which requires the rates and the money of the corporation to be expended for the matters mentioned in the provisions of the statute or incidental thereto, and according to the appropriations under the statute made by the proper authorities by which every dollar is earmarked.

RUSSELL, J., concurred.

LONGLEY, J.:—I agree with my brother Graham that the plaintiff may take these proceedings on behalf of himself and other ratepayers without resorting to the use of the name of the Attorney-General.

I also agree that the proceedings against the defendant Doane should be dismissed on the grounds stated.

With some diffidence I am compelled to dissent from the conclusions of my learned brother respecting the proceedings against the defendant McIlreith. I am conscious that there is no express authority for the payment of the money of the corporation to the mayor for the expenses of attending a meeting of representatives from all Canadian cities for the purpose of deliberating upon matters respecting good civic government in Canada. But I recognize that such conventions for deliberation are likely to be advantageous to all cities, and it would be a misfortune if any city by niggardliness or from want of power to pay delegates should be unrepresented. I conceive that corporate bodies have some powers in the appropriation of money for matters of general advantage inherent, and which may be exercised

apart from any special enactment. Such powers are certainly recognized by Dillon on Corporations. An Act, I understand, has been passed by the Legislature authorizing such appropriations, and this, I conceive, is a recognition by the law-making power of the value and utility of such expenditures.

I am not aware that there have been judicial decisions against the legality of such expenditures by city councils, but I have found none which are binding upon me. I give due weight and respect to those judicial opinions which have been given, but I would prefer to exercise my own judgment in this matter until judgment had been given by some tribunal whose authority I am bound to accept. I think that the same principle which would enable a city council to send an engineer abroad to study some system of engineering which could be adopted with advantage by the city—a principle which I think is not seriously questioned—is available to support an appropriation sufficient to cover the actual expenses of the mayor or any councillor selected for that purpose in attending a convention of civic rulers for the purpose of discussing questions of interest and importance in relation to city government.

I therefore think the proceedings against both defendants in this case should be dismissed with costs.

NOVA SCOTIA.

GRAHAM, E.J.

MARCH 4TH, 1907.

RODGER v. MINUDIE COAL COMPANY.

Railways — Tolls — Rate not Approved—Rate Fixed by Predecessor in Title — Payment under Protest — Set-off — Counterclaim.

Trial of action.

J. L. Ralston, for plaintiff.

W. T. Pipes, K.C., for defendant.

GRAHAM, E.J.:—It appears that the Canada Coal and Railway Company, of which the plaintiff is liquidator,

before the insolvency, and that the liquidator subsequently (the date is 10th May, 1904) owned a railway line from Maccan on the Intercolonial Railway to the Joggins Mines, 12 miles long, for shipping their coal over the Intercolonial Railway.

The defendant company, also a coal company, had a short branch from their mine at River Hebert to the plaintiff's branch, but had no cars. As a fact they both used the cars of the Intercolonial Railway. Formerly the Government did not charge the Canada Coal Company rental for the time their cars were waiting on these branch lines in the use of these companies. It had a charge of \$1 per day per car after 48 hours, but waived it in this company's case. Later it put on a charge in general use with all railways, viz., 20 cents a day per car, and 80 cents a day additional after twenty days. The Government charged and the Canada Coal Company paid this rate, and not only for the cars in use on its own line, but on the cars in use at the defendant company's mine on that branch. And it is not disputed that this was correct. The Canada Coal Company notified the defendant company of this charge and demanded it from them and for some time it was paid.

The defendant company's manager, at the trial, hardly disputed the justness of it. There was an implied contract to pay the Canada Coal Company the money which that company paid to the Government really for the defendant company, and the defendant acquiesced in the charge by some payments made to the Canada Coal Company. The Canada Coal Company had also a charge for weighing the defendants' coals. They are weighed at Maccan on the government scales, by the Canada Coal Company's employee. I think it is a reasonable charge, and although it is now done by the Canada Coal Company at a less cost than that which was required when the agreement was made for that charge, I allow it.

This made the plaintiff's claim in all \$1,080.30, against which there is an admitted set-off for coal of \$532.36. This leaves a balance.

But the defendant company has a claim which it puts forward.

The defendant company says, first, that the tolls which it paid for having its coals hauled over the Canada Coal

Company's line by that company covered this charge for rental.

I do not assent to that contention for several reasons, and I find that it did not.

But it has put forward a set-off for overcharges in the matter of those tolls which have been paid.

The Canada Coal Company passed a by-law fixing its tolls for hauling coal at 40 cents per ton, and it has charged and exacted that rate from the defendant company.

By the Railway Act, now R. S. (1900) c. 99, s. 219, it is provided as follows (formerly 1898 c. 4, s. 19):

"No tolls shall be levied or taken until the by-law fixing such tolls has been approved by the Governor-in-Council; nor shall any company levy and collect any money for services as a common carrier except subject to the provisions of this chapter."

It appears that the company submitted the by-law fixing the rate to the Lieutenant-Governor-in-Council, but apparently no action was taken in regard to it.

It also appears that the Canada Coal Company acquired this property from a former company, the Joggins Railway Company, and that the Governor-in-Council had, in 1887, approved a by-law of that company fixing the tolls for coal at 28 cents over this same railway.

And the defendant company contends that this bound the successor of the Joggins Company, and that the defendant company is entitled to recover back the difference between the 28 cents so fixed and the 40 cents actually exacted.

I should not have thought that in the ordinary course, under the language of this statute, the Canada Coal Company was bound by the 28 cent rate so fixed and approved, merely by virtue of its having acquired the property of the Joggins Company, but perhaps I have not the data before me. But there is this dilemma if it is not so, namely, it has no approval for the rate it has fixed. And in either case there is an overcharge sufficient to wipe out the plaintiff's balance, claimed in this case. There is more than enough while the company operated the road, and also while the liquidator operated it.

The letters of the defendant company of 28th and 31st October, 1903, responding to the Canada Coal Company's

letter demanding 40 cents per ton, constitute a sufficient protest against the overcharge of 12 cents per ton, and shew that the additional amount had to be paid in order to have the coal moved. It assumed that the Joggins Railway by-law bound. In one of these letters it is said: "This we pay to you under protest, and in so doing we do not admit your right to such payment, but pay it because you have refused to transport our coal otherwise."

I do not know why the government took no action on the by-law of the Canada Coal Company for the larger rate, but it is one of the cases in which silence does not give consent. Perhaps it treated the matter as if the 28-cent rate was in force. I think the Canada Coal Company was left exposed to the effect of this drastic legislation, and in law there is an overcharge.

Objection was taken to the defendants' pleading in the matter of the set-off. But I think it is sufficient. Money had and received by the Canada Coal Company, and by the liquidator afterward, to the use of the defendant company, was, I think, a proper form of action for money paid under protest where it was not lawfully payable. I therefore need not make the amendment asked for by defendants. The defendants are not entitled to any judgment for any excess of its claim over and above the plaintiff's claim. They have, by their pleadings, put that amount against the plaintiff's claim. And as I understand the English idea of set-off, they would have no judgment for any excess. There is no counterclaim pleaded here. But in case the old practice of set-off in Nova Scotia, enabling the defendant to have judgment for any excess, still prevails, I think the defendants cannot have judgment for any excess here because it is not asked for in the pleadings. And even then it could not apply under the Winding-up Act against the estate of the company, so far as the claim is against the Canada Coal Company certainly not in full.

The defendant company will have judgment dismissing the action with costs, except those costs which are incidental to the issues raised in respect to the plaintiff's claim other than the set-off.

The plaintiff will have the costs of those issues.

NOVA SCOTIA.

GRAHAM, E.J.

MARCH 4TH, 1907.

THE MITCHELL COMPANY v. THE SIMSON
COMPANY.

*Sale of Goods—Loss by Fire before Delivery—Acceptance—
Statute of Frauds—Memorandum in Writing—“Usual
Terms.”*

Trial of action.

H. Mellish, K.C., for plaintiffs.

W. B. A. Ritchie, K.C., for defendants.

GRAHAM, E.J.:—On February 24th, 1904, the defendant company at Halifax, in reply to a telegram, telegraphed to the plaintiff company at Toronto as follows: “Duplicate last order cassia, include 20 bags ginger eight and half.”

The previous order included “25 bales selected broken cassia. Terms as usual, 9¾.”

The same day the defendants wrote a letter to the same effect.

The plaintiffs replied same date informing the defendants that they had cabled the order.

On March 19th, 1904, the plaintiffs addressed a letter to the defendants as follows: “A few days ago we received confirmation of your order for China cassia at 10 cents which price we accepted as the market will undoubtedly go higher.” And on the 24th March, 1904, the defendants wrote: “We have yours of the 19th here and note that you have placed our order for broken select cassia at 10 cents, shipment later, and we are herewith confirming this.”

This is the invoice: “Toronto, August, 1904. From the Charles J. Mitchell Co., Ltd., Toronto. For Messrs. Simson Bros., Halifax: Extra selected broken China cassia, 25 bales, 1,666 lbs., at 10c., \$166.60.

The cassia with a like amount for another Halifax customer, one Schwartz, was shipped at Hong Hong, via New York and Boston, to Halifax, where it came to the Plant wharf. On its arrival the plaintiffs’ brokers, Messrs. Grant, Oxley & Co., to whom it was addressed, passed the goods at the customs and paid the duties and all charges on the fifty

bales. A member of that firm went down to the Plant wharf, examined the cassia and said it was in good condition. He paid the freight, detached the delivery stub from the freight bill and gave it to the wharfinger. Then he sent by a clerk to the defendants the following delivery order on the wharfinger: "Please deliver bearer Plant line Simson Bros. 25 bales cassia ex Olivette. Grant, Oxley & Co."

This was delivered to a clerk of the defendants on the 12th. A similar one was delivered to Schwartz for his 25 bales and Schwartz went and got them. Unfortunately the defendants did not send for theirs, and on the afternoon of September 5th a fire occurred and this cassia was destroyed.

The defendants' secretary, Mr. Hockin, was called by the plaintiffs and he stated that the usual terms were 2 per cent. 10 days, or net 60 days. He also detailed the course of dealing, which extended over several years. He says: "The course of business was, we would order the cassia. Plaintiff would have it come here and have it passed by his brokers, and we would pay him for the net weight. He would send us an invoice and advise us, so that we would get a delivery order from their agents, and we would send for the goods and put them in our warehouse, and if the goods were damaged we would advise the agents. We would take the delivery order from Grant, Oxley & Co. We would haul them to our warehouse provided they were in good order. If there was anything wrong with the goods we would claim a reduction. It would come to different wharves. Sometimes it would come on the Allan line and sometimes on the Plant line. Our practice was to take the goods from the wharfinger. We would get them free. We know nothing about the duty. The agent attended to all that. We had no charges to pay on them."

It appears that in the case of the ginger shipped earlier which was not up to sample, it was repudiated by defendants after the defendants had hauled it to their warehouse and there was a compromise about it, the defendants taking some of it to help out the plaintiffs.

Later the secretary stated: "Q. Will you tell me how much there is in a bale of cassia? A. A good deal depends where it comes from. If it is China, it would be sixty-six and two-thirds pounds. There is a natural shrinkage in it when it gets to Halifax from China.

"Q. At that time what was your practice in respect to goods from Mitchell regarding weighing and inspecting?

A. We usually, if they were in bad order at the wharf, called the agents' attention to it. After getting the delivery order our men would go down and inspect the goods. Sometimes we could tell the damage because it was apparent from the outside. They would say to us to take them and weigh them. They would be taken to our warehouse. If we weighed them and said there was so much short they would say it would be all right. The quality of them we did not know. Q. Sometimes you could tell from the outside of the package that something would be wrong. Would the agent be represented? A. If the damage was apparent they saw it at the wharf. Q. Would they then come to your warehouse? A. No, we opened it at our warehouse and got the net weight and compared it with our sample. If not up to sample we would reject it. Q. What were the goods you did reject? A. Ginger, Mr. Mitchell was right there—and we held it and repudiated it. We would notify them of the condition, and they would leave it to report the condition to them, and we paid for what we got. When I say damaged, I mean some of the package was damaged. It would be a loss by the breakage of the package. Q. You would take the goods although the goods were damaged and short? A. Yes, and pay for what we got. Q. And you notified them so that they would have no suspicion that you were cutting down their weights wrongfully? A. Yes. Q. The 25 bales weighing 1,666 lbs., would be the smallest bales you dealt with in your trade with them? A. Yes."

In respect to the receipt of the delivery order, he says: "Q. You don't know when they got it? A. The company got it. Someone should have handed it to me, but they did not."

It appears that the secretary was the person to look after the shipment, and he had not been informed of the delivery order until after the fire.

There was in my opinion a sufficient delivery of the goods: *Thol v. Hinton*, 4 W. R. 26; *Wood v. Tassell*, 6 Q. B. 234; *Salter v. Williams*, 2 M. & G. 650; *Farnham v. Pilcher*, 151 Mass. 474. There was a subsequent appropriation by the vendor of 25 bales to the defendants when the wharfinger delivered 25 bales to Schwartz at the instance of Grant, Oxley & Co., leaving 25 bales there. That election could not be recalled. And there was a previous assent on the part of the defendants to a selection of 25

bales for them. It was then in my opinion that the goods passed to the defendants.

In Benjamin on Sales, 1906 ed., pp. 346, 347, it is said: "Perhaps the case of *Godts v. Rose* is even more in point to shew that there must not only be an appropriation but an appropriation assented to by the vendee. The assent of the vendee may be given prior to the appropriation by the vendor. It may be either express or implied, and it may be given by an agent of the party, by the warehouseman or wharfinger, for instance. The assent of the buyer is implied as shewn in *Aldridge v. Johnson*, and in several of the cases already quoted, where by the terms of the contract the seller is vested with an implied authority to select the goods, and has determined an election by doing some act which the contract obliged him to do, and which he could not do till an appropriation was made."

Although by the course of dealing between the parties if the goods were damaged there was a right to reject them, or a right to weigh and deduct from the price, that did not, in my opinion, prevent the goods from passing. These goods at least were not in that condition. They were in a deliverable state. I do not understand that it was necessary in the ordinary course to ascertain the price by weighing. The bale had a given weight which was sufficiently near to the correct thing for ordinary purposes. But apparently the defendants had the right to weigh them and have the shortage allowed for. But it was no part of the vendors' duty to weigh. It was the plaintiffs who might do so, and the defendants did not have to participate in the weighing. The defendants had more than a reasonable time for inspecting the goods.

I refer to Benjamin on Sales, pp. 322, 323. He says at the latter page: "Where the acts to be done to make the goods deliverable or to ascertain the price are to be done by the buyer, the rules above quoted do not apply, and the passing of the property will ordinarily not be postponed until those acts are done." He refers to *Turley v. Bates*, 2 H. & C. 200.

Then it is contended that there was not a sufficient memorandum of the bargain within the section of the Statute of Frauds relating to goods. This I think relates to the terms of payment. I am of opinion that the price and the terms of payment were sufficiently stated. In the

previous order, to which this one referred, there is the expression "Terms—Usual." And the question is whether, as was done here, parol testimony could be given as to what the usual terms were. I think it could. Reference is to a standard, which need not be in writing.

There was also a contention made that the place of delivery was not mentioned. But under this section of the statute it appears that it is not necessary that the memorandum should state all the terms of the consideration: Brown on the Statute of Frauds, s. 381, a.

The plaintiffs will have judgment against the defendants for the amount of their claim, \$166.60, with costs.

NOVA SCOTIA.

MEAGHER, J.

FEBRUARY 25TH, 1907.

THE DOMINION IRON AND STEEL COMPANY v. THE DOMINION COAL COMPANY.

*Pleading—Irrelevant Allegations — Narrative — Striking out
Pleas.*

Motion to strike out pleas as embarrassing.

J. J. Ritchie, K. C., and H. A. Lovett, in support of motion.

H. Mellish, K.C., and H. McInnes, contra.

MEAGHER, J.:—Paragraphs 4, 5, 6, 7, 8a, and 24 are sought to be struck out of the plaintiffs' statement of claim under O. 19, rr. 4 and 27. I am unable either from the frame of the statement of claim or from the agreement sued on, and which is set out at length, or from both, to discover with any degree of certainty the object or purpose of the averments made in these paragraphs. It may be that they should be regarded as harmless narrative, but what was said in support of them rather indicates the contrary. The portions of the agreement in respect to which breaches are alleged seem reasonably definite and plain, and, apparently there is no need to travel outside of its terms to ascertain its meaning. This, however, may not be the case when examined critically. Moreover, it may be that upon the trial a situation may be produced calling for proof of the matters

alleged in order to a correct interpretation, and application of the agreement to the facts.

If the first of these two positions is the correct one, then the paragraphs in question are wholly unnecessary; but if necessary for the purposes suggested in the second position, then, in the absence of suitable averments shewing why, or wherefore, they are necessary—or the sense, or application in which the averments made therein were intended to be applied in aid of the plaintiffs' case—it seems to me they are embarrassing. If necessary for any purpose the plaintiffs have in view in the action, such purpose could easily have been alleged. The defendants would then know what they had to meet and could easily determine whether to ignore the averments, deny them, admit them, or confess and avoid them.

The rule is that a pleading ought to state such facts as will put the other party on his guard, and tell him what he will have to meet upon the trial. But in a case like the present, where there appears to be many facts alleged prior to, as well as subsequent to, the agreement sued on, it does not appear to me to be enough to state facts which upon the face of the pleading itself have no necessary or apparent relevancy to the breaches assigned, or the relief sought, without also shewing the sense in which their relevancy is claimed to consist, and which is intended to be insisted upon by the plaintiffs.

The plaintiffs' contention was that 4, 5, and 6 were intended to shew the prior situation between the parties, and they were therefore not irrelevant as the contract must be interpreted in the light of the surrounding circumstances. That may or may not be so; but if the contract is free from ambiguity, and its meaning apparent—and so far as these pleadings go there is no suggestion to the contrary—then these paragraphs were unnecessary as I have already stated.

Paragraph 7, if intended to affect the defendants with notice or knowledge of the plaintiffs' situation, or needs, should have contained a suitable averment in that behalf. It is not, however, a question, having regard to the frame of the action, what notice, or knowledge, the defendants may have had when they made the agreement sued on; the real, and the only question is what obligations did they assume by the agreement and have they failed to perform them.

It was further contended for the plaintiffs that the defendants contracted to supply coal fit for the plaintiffs' use, and therefore paragraphs 8a and 24 were material. If the agreement means that it needs no extrinsic aid from anything alleged in the paragraphs assailed—if it does not mean that in terms, or its meaning is not clear, and the extrinsic circumstances and facts adverted to are required to aid in developing, and determining, its true meaning, then it should be averred why and wherefore they are so required.

While I entertain a fairly strong opinion that the pleading offends against the order invoked, still I shall not make an order at present striking them out, and, in order to prevent any wrong arising through my opinion happening to be erroneous, I shall give the plaintiffs twelve days from this date to amend their pleadings if so advised, and in that view adjourn the motion until the 12th March at Chambers.

NEW BRUNSWICK.

FULL COURT.

FEBRUARY 22ND, 1907.

COLLINS v. CITY OF SAINT JOHN.

Negligence—Carriers—Ferry—Implied Invitation to Alight—Dangerous Space Between Ferry and Wharf—Damages—Husband and Wife.

Motion by defendants for a new trial in an action tried at St. John Circuit before Landry, J., and a jury, to recover damages for the death of the plaintiff's wife caused by defendants' negligence in operating a ferry. There was a verdict for \$1,000.

The motion was argued on November 9th, 1906, before TUCK, C.J., HANINGTON, LANDRY, BARKER, McLEOD, and GREGORY, JJ.

G. V. McInerney, K.C., for plaintiff.

C. N. Skinner, K.C., for defendants.

TUCK, C.J.:—In this case the plaintiff sues the city of Saint John to recover damages sustained by him, from the negligence of the city's servants and employees, which caused the death of his wife within a year from the date of the accident. The suit is brought under the provisions of C. S.

1903 c. 79, "respecting compensation to relatives of persons killed by wrongful act, neglect or default," founded on the Imperial Act generally known as Lord Campbell's Act.

It appears that Jane Collins (who was living with her husband at Lepreaux) on the 15th January, 1906, came to Saint John to do some shopping, and on crossing in the ferry-boat, on the way to the east side of the harbour, at about eight o'clock in the evening, after dark, while she was coming off the ferry-boat which had got to the landing at the floats, warning having been given that passengers might land, and the gang-plank having been put down, she fell between the boat and the floats, and was so badly injured that just sixteen days afterwards she died in the public hospital, from injuries she received from that fall, as the plaintiff alleges.

The steamer "Ouangondy" was the ferry-boat running at the time, having been put on in the place of the "Ludlow." It is said, and with truth I think, that the "Ludlow" is a larger boat than the "Ouangondy" and is so built that she will exactly fit into the floats; that the ferry-boat "Western Extension" also fits, but that the "Ouangondy" does not; that when the last named boat comes into the floats, instead of filling up the concave of the float, from the rail where passengers go ashore, there is a space from twelve to fourteen inches between the boat and the float; and that when the tide strikes her stern and sends her down the boat's starboard bow is from twenty to twenty-four inches from the float, and that the opposite would happen as to her port bow when the tide running the other way sends the stern up.

The plaintiff says that it is negligence on the part of the city to have floats so constructed that passengers coming off, at night, in the dark, may be drowned or crushed, between the boat and the floats. This woman went down in that space. She was not going off by way of the gang-plank, but it is claimed that the gang-plank is not the place where foot passengers are supposed to get off the boat; that it is put there for teams and cattle.

Jane Collins died on the 1st of February following the accident. She first went to Lepreaux, became seriously sick while there, was removed to the public hospital at St. John, where she died as before stated, from the injuries, the plaintiff says, which she received in getting from the ferry-boat to the floats.

There is some difference of opinion on the part of the witnesses as to the space between the boat and the floats,

where the woman tried to get off. She was a stout person, but there is no doubt that there was space enough for the woman to fall through until she brought up by the arms, and was by some of the hands lifted to the deck or the floats.

There are two questions to be considered: first, was there negligence for which the city is responsible; and then, if there was, how are the damages to be determined?

The jury, in answer to questions, found that Mrs. Collins was not guilty of negligence when she met with the accident; that the damage she suffered by reason of the accident from the time it occurred until her death was \$100; that the damage to the plaintiff was \$900; that it was negligence to have let down the side chains before the middle chain, thereby giving an intimation to foot passengers that they might then go that way and land; that it was negligence in not having any protection, starting from the side chains directing the way to the gangway; that it was negligence in not giving warning as to which way the passengers should go to reach the gangway; and that there was a dangerous space between the boat and the floats, and that was negligence. The jury did not answer the question, "was there sufficient light to indicate the open space, if any, and if not, was that negligence?"

Upon the answers to the questions the learned Judge before whom the cause was tried directed that a verdict be entered for the plaintiff for \$1,000. I do not see how he could have done otherwise upon the findings..

This is a motion for a new trial on the ground of misdirection, and excessive damages. On the ground of misdirection, there are twenty-four objections named in the notice to the Judge's charge. I do not propose to consider these objections seriatim, but to say generally, that I have read the Judge's charge, and I consider it, on the whole, moderate and unobjectionable.

I think also that there is ample evidence to justify the jury in finding negligence. In fact no objection is taken to the findings on this score.

The damages are large, but I cannot say they are excessive. They are more than I would have given.

As to the principle on which damages in such cases as this should be assessed, I would refer to the case of *St. Lawrence and Ottawa R. W. Co. v. Lett*, 11 S. C. R. 422, where it was held by Ritchie, C.J., Fournier, and Henry, JJ., (Taschereau, and Gwynne, JJ., dissenting), that although

on the death of a wife caused by the negligence of a railway company, the husband cannot recover damages of a sentimental character, yet the loss of household services accustomed to be performed by the wife which would have to be replaced by hired services is a substantial loss for which damages may be recovered. I think the Judge's charge was along the line of the principle there laid down; and I do not see that the jury followed any other principle in assessing the damages which they found.

Runciman v. Star Line S. S. Co., 35 N. B. R. 123, was cited by the defendants on this question of excessive damages, but it does not bear on this case. There a verdict was given for the plaintiff for \$3,500. A new trial was granted, because the jury misunderstood the principles upon which damages should be assessed in such a case.

The cases of *Clark v. London General Omnibus Co.*, [1906] 2 K. B. 648, and *Osborn v. Gillett*, L. R. 8 Ex. 88, discuss pretty fully the question of damages and the right to recover them, but I do not see that the decision in the case at bar in any way controverts the principles therein expressed.

HANINGTON, LANDRY, and BARKER, JJ., concurred.

MCLEOD and GREGORY, JJ., took no part.

NEW BRUNSWICK.

FULL COURT.

FEBRUARY 22ND, 1907.

SILLICK v. GROSWEINER.

Bankruptcy and Insolvency—Composition Agreement—Guaranty of Payment—Creditor's Claim More than Amount Scheduled—Alleged Agreement for Special Advantage—Finding of Fact—Duty of Appellate Court.

Appeal by the defendants from the judgment of Forbes, Co. J., in favour of the plaintiffs for the amount of an unpaid instalment under a composition deed, payment of which had been guaranteed by the appellants; argued on November 10th, 1906, before TUCK, C.J., HANINGTON, LANDRY, BARKER, MCLEOD, and GREGORY, JJ.

M. G. Teed, K.C., for appellants.

A. W. MacRae, for respondents.

TUCK, C.J.:—This is an appeal from the verdict of the Saint John County Court. The action was tried before Judge Forbes without a jury, and the Judge found for the plaintiffs and assessed the damages at \$117.90.

The judgment of Judge Forbes is short and is as follows: "After a careful perusal of the evidence, and patiently considering the arguments of counsel, I have arrived at the conclusion that there was no agreement by which the plaintiffs were to have any undue preference over any of the defendant Baron's creditors. The evidence of Sillick and Cassidy seems to shew there was some talk about an additional payment to the plaintiffs, whether before or after the deed was signed they cannot say. The evidence of Rubin contradicts this statement and he positively swears there was no such understanding or agreement. Having had the witnesses before me, I have no hesitation in believing the evidence of Rubin. I therefore find for the plaintiffs and assess the damages at \$117.90, the amount of the unpaid dividend, and costs."

As to the facts in the case, which facts I take largely from the statement filed with the Court by the appellants: It appeared upon the trial that one Nathan Erron carried on business at Moncton, in New Brunswick; became involved, and unable to pay his creditors in full. Thereupon a composition deed was prepared, dated the 20th of September, 1905 (but appears to have been executed by the creditors subsequently to that date), whereby the creditors agreed to take a compromise of forty-five cents in the dollar, payable in four equal quarterly payments of eleven and a quarter cents each, the first of such payments to be made on the 12th of October then next, and each of the subsequent payments, at two, three, and four months, respectively from the date of the deed. The payment of the compromise was guaranteed by the appellants Sillick and Cassidy, parties to the deed as guarantors and sureties.

The Saint John creditors' claims amounted to about two thousand dollars, of which the respondents were creditors for \$1,047, but when the deed was signed by the appellants (the guarantors) the claim of the respondents was placed in the list of Erron's liabilities at about \$800. But when the respondents signed, they did so only on condition that they should rank for the full amount of their claim. Erron's total liabilities were between three thousand and four thousand dollars.

Erron paid the first three instalments, but failed to pay the last one; and this action is brought to recover this last instalment.

The defendants all appeared and pleaded (though Erron did not appear at the trial); and the substantial defence to the action is that the respondents cannot recover because before the composition deed was signed by them they illegally and improperly stipulated for and obtained the promise of an additional amount of \$183.68, over and above the compromise provided for by the deed, and that when they signed the deed they signed for and sought to recover more than the schedule. This additional amount of \$183.68, as the appellants contend, was shown to be secured to the plaintiffs, Grosweiner et al., by four promissory notes of \$45.92 each made by the appellant Cassidy in favour of the respondents, dated the 23rd of September, 1905, and payable at one, two, three and four months.

At the trial Joseph Sillick, a witness for the appellants, swore that Jacob Rubin, business manager for the respondents, had been at Moncton about the compromise; and that he had heard Rubin say to Erron that he (Rubin) would want more than the forty-five cents, and that it would be best for Erron as he would help him; that theirs (respondents') was such a big loss he would not sign unless he got more than the forty-five cents. Erron said he would have to see Cassidy.

The appellant, Cassidy, in his evidence says that he met Erron and Rubin, and that Erron told him in the presence of Rubin that Rubin's firm wanted more than forty-five cents, and asked him (Cassidy) to sign the notes for the extra sum, because Erron said that Rubin would not take his (Erron's) notes.

According to appellants' statement the refusal of Rubin to sign unless notes for the additional amount were given resulted in the parties going to the office of E. Girouard in Moncton, who drew up four notes for \$45.92 each in favour of the respondents and that he (Cassidy) signed them, and they were held by Girouard on the condition, as was set out in the memorandum that was drawn up, that if all the creditors signed, the notes were to be given to the respondents.

All of the creditors signed the composition deed except one for a small amount, namely, the Berlin Suspender Company for thirty dollars.

The memorandum that was drawn up and all these notes were put in evidence at the trial. These notes had never been delivered to the respondents.

Rubin in his evidence denies that he ever told Erron that he would not sign unless he got more than the forty-five cents; and swears that there was no understanding or agreement that he should get more. He denies also what Cassidy says that Erron told him in Rubin's presence that the notes left in Girouard's office had anything to do with Rubin's signing the deed of composition. He (Rubin) says that the notes were given to secure future advances and for money he had personally lent Erron, to go to the States on a former occasion. In fact he flatly denies what Cassidy swears to.

The foregoing is substantially the evidence given at the trial.

The appellants' counsel claims to have urged in argument before the County Court Judge, that the appellants should have a verdict, because there was a variation of the contract by the plaintiffs, insomuch as they signed for and sought to recover in respect of a claim \$250 larger than the schedule; and also that the plaintiffs could not recover on the ground of illegality by reason of the secret agreement and stipulation that they would receive more than the other creditors.

The County Court Judge has not returned any minutes of the argument before him.

Those grounds and others are now taken in the argument of this appeal. As to the first: It is a question of law. No authority was produced to shew that the defendants are in this case discharged from the payment of the fourth instalment because the plaintiffs signed the composition deed for and sought to rank for a larger amount than is set out in the schedule of creditors attached to the composition deed. The reason urged is because this is a variation of the contract of suretyship. Why should they not sign for all that was due them from Erron? If the amount was \$1,000, there is no reason why they should be bound by the schedule naming \$800. The sureties (the appellants) although they had signed the deed before the respondents knew when the deed was signed by the respondents what they (the respondents) claimed and apparently consented. I think the appellants (the defendants below) ought not to be discharged from payment because the amount claimed differs from the schedule.

I do not see that the Judge has ignored and rejected all consideration of the written agreement made in Girouard's office respecting the four notes signed by Cassidy in Rubin's presence in favour of the plaintiffs for the extra amount above the forty-five per cent. The making of these notes is admitted by Rubin, but it must be borne in mind that according to his evidence the signing of them had nothing whatever to do with the composition deed, and that he (Rubin) was not thereby induced to become a party to the deed; that the notes were given for a wholly different purpose, and he names the purpose. I think that the appellants fail on this point.

If effect is to be given to Rubin's evidence, then the writings and documents produced are not inconsistent with the findings of the Judge, and considering the whole evidence it comes to this, whether or not the trial Judge ought to have believed Rubin's evidence. There can be no doubt about the law that the plaintiffs cannot recover if there was a secret agreement or stipulation that the plaintiffs should receive more than the other creditors. But the County Court Judge has found that there was no such agreement. See Winslow on Private Arrangements between Debtor and Creditor, pp. 150-156.

Upon the question of fact, I think the appellants ought not to succeed in opposition to the finding of the Judge. The cases cited at the argument, and others to be found in the books, are the other way. *Smith v. Andrews*, 17 N. B. R. 541, decides that where the County Court Judge, who tried the cause, and who had the advantage of judging of the manner in which the witnesses gave their testimony, has after argument and deliberation come to the conclusion that the verdict is against evidence, the judgment will not be reversed on slight grounds. Surely the converse of this proposition must be true.

All that *Dempster v. Lewis*, 33 S. C. R. 292, decides is that there is no rule of law or of procedure which prevents the Supreme Court or an intermediate court of appeal from reversing the decision at the trial on the facts.

Then there is the well known case of *Metropolitan R. W. Co. v. Wright*, 11 App. Cas. 152, where it is held that a new trial ought not to be granted on the ground that the verdict of the jury was against the weight of evidence unless the verdict was one which a jury viewing the whole of the evi-

dence reasonably could not properly find. See also *Solomon v. Bitton*, 8 Q. B. D. 176.

In *Colonial Securities Trust Co. v. Massey*, [1896] 1 Q. B. 38, it is held that where a case tried by a Judge without a jury comes before the Court of Appeal, the Court will presume that the decision of the Judge on the facts was right, and will not disturb it unless the appellant satisfactorily makes out that it was wrong.

Paridis v. Municipality of Limoilou, 30 S. C. R. 405, was a case of an appeal on questions of fact. There the Court held that where there does not appear to have been manifest error in the findings of the Court below, they will not be disturbed on appeal.

I think that this appeal fails and must be dismissed with costs.

MCLEOD, J.:—It was simply a matter of fact whether there was an arrangement that the respondents were to receive an additional amount for signing the composition deed. The Judge found under the evidence that they had not received any such amount, and I think the evidence fully warranted him in finding it. Indeed I think the weight of the evidence was with the finding of the learned Judge, and therefore I think the appeal should be dismissed.

HANINGTON, and LANDRY, JJ., concurred.

BARKER, and GREGORY, JJ., took no part.

NEW BRUNSWICK.

BARKER, J.

MARCH 22ND, 1907.

CANADIAN PACIFIC RAILWAY COMPANY v. NASON.

Injunction—Ex parte Application—Suppression of Facts—Dissolving Injunction—Interpleader—Affidavit Negating Collusion.

F. R. Taylor, for plaintiff.

M. G. Teed, K. C., and L. P. D. Tilley, for defendants.

BARKER, J.:—On the 21st February last I granted an *ex parte* order restraining the defendant Nason from proceeding in a suit at law against the plaintiffs, brought for the recovery of \$79.50 said to be due to him for wages. This

action was commenced on the 17th September, 1906, and a declaration was served on 29th January last, so that at the time the injunction was granted the time for pleading had about expired. The defendant Steeves was also by the same order restrained from proceeding in a certain action brought by him in the State of Maine against the plaintiffs, in which, under the laws of that State, this same debt from the plaintiffs to Nason was attached in order to compel the plaintiffs to pay it to Steeves, to whom Nason was indebted. The plaintiffs, under the order of the Court, paid the money into Court. There is no dispute about the debt being due, and so far as the affidavits disclose the facts, there is none as to the indebtedness from Nason to Steeves. The plaintiffs, finding themselves in danger of being held liable to pay the money twice, filed this bill by way of interpleader, that the parties might be driven to settle their own disputes as to the money, about which they raised no question. This is a motion on the part of the defendant Nason to dissolve the injunction and one of the grounds is that the bill was not accompanied by an affidavit denying collusion. As to this point the plaintiffs have taken out a summons calling upon the defendants to shew cause why the affidavit should not be filed. I shall dispose of that application now. So far there does not seem to have been any judicial decision in Maine covering this particular case, and opinions seem to differ as to the extent of the jurisdiction given by the statute. To the plaintiffs the question is of no moment so long as they are only bound to pay once. To the defendant Nason the only difference which I can see is whether the money will go to Steeves to pay him or go to Nason himself. This individual case is however one of many likely to arise, in fact others have arisen already, owing to the plaintiffs' line of railway running through a portion of Maine, and the likelihood of their being harassed in a similar way in the future. Before Nason commenced his action here there was quite a correspondence between his solicitor and the plaintiffs' solicitor at Montreal, as well as their legal representatives at St. John, in reference to the situation and the desirability of obtaining a decision on the question involved by a Maine Court. There seem to have been delays in the proceedings there and no decision has been given. The parties there seem to have agreed that a test case might be made of the Nason claim and a decision obtained in the Court here. In a letter dated 5th September, 1906, from the plaintiffs' solicitor at Montreal

to Nason's solicitor here, he says: "The question is being raised in another action, but that will not be returnable until the end of this month, and I have thought it well that we should bring the question before the New Brunswick Court in order to find out the view taken there and if necessary plead this in actions brought in the Maine Court. If you will issue your writ Messrs. Weldon & McLean will accept service on behalf of the company. They have been instructed to expedite the matter as much as possible. I am very much disappointed that we have not been able to get the matter judicially determined in Maine, and sooner than hold the matter any longer I prefer to have an action brought in New Brunswick and the question determined there so far as the New Brunswick Courts are concerned." Of course Nason could bring his action without the plaintiffs' consent, but it is obvious that the proceedings were taken perhaps not at the suggestion of the solicitor, but certainly with his full concurrence, so that the question, which was of a greater interest to them than what arises from this individual case might be determined, so far as a judgment of a New Brunswick Court could determine it. None of this correspondence was disclosed to me when the injunction was obtained. Had it been it would have had a material bearing on the course I should have taken. On this ground, if on no other, I think the injunction must be dissolved. No rule requires a stricter observance than that which insists upon a full and truthful disclosure of all material facts by those who seek the interposition of this Court by way of injunction orders granted on ex parte statements.

As the injunction is dissolved there seems no reason why the plaintiffs should not have the right to supply the affidavit denying collusion, if they wish to continue the suit in its present form. They must, however, pay the costs of both motions and they are entitled to have the money paid into Court restored to them. There will be orders accordingly. Plaintiffs will have leave to move again for an injunction if they desire to do so: See *Filch v. Richfort*, 18 L. J. Ch. 458; *Phillips v. Richard*, 1 Jur. N. S. 750.

Defendant Nason to have an order dissolving injunction with costs.

Plaintiffs to have leave to take bill off file and file it anew with affidavit denying collusion on payment of costs of application.

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NEW BRUNSWICK.

BARKER, J.

MARCH 22ND, 1907.

THE GAULT BROTHERS COMPANY LIMITED v. MORRELL & SUTHERLAND.

Conditional Sales—Future Acquired Goods—Assignment for Benefit of Creditors — Possession Taken by Conditional Vendor—Conditional Sale Agreement not Registered—Bills of Sale Act—Assignment of Book Debts—Notice to Debtors—Action by Assignees of Book Debts to Compel Debtors to Deliver Possession.

M. G. Teed, K.C., and C. S. Hanington, for plaintiffs.

A. I. Trueman, K.C., and J. K. Kelley, for defendants.

BARKER, J.:—The material facts upon which this case turns have been agreed upon and stated in the nature of a special case filed in Court. The defendants Morrell & Sutherland (whom I shall refer to as the defendants) previous to their entering into the agreement out of which this litigation arises, had been clerks in a dry goods establishment at St. John. They were anxious to start a business of their own, and they entered into partnership for that purpose. As their combined capital consisted of only about \$400 they were obliged to make arrangements for procuring goods on credit. For this purpose they applied to the plaintiffs, who carry on a large wholesale business as dry goods merchants at Montreal, and as a result of that application the agreement of 13th December, 1898, was made. It is in the form of a letter addressed by the defendants to the plaintiffs, accepted by them and acted on by both parties from that time

until the defendants' failure. During that period—a little over six years—the plaintiffs supplied the defendants with goods to the value of about \$55,000; and on the 17th February, 1905, when the plaintiffs took possession, the defendants owed the plaintiffs for goods supplied, \$9,486.16. The stock then on hand consisted of goods supplied by the plaintiffs of the value of \$5,470.70, and goods obtained elsewhere and shop fixtures of the value of \$9,941.44, making the total value \$15,412.14; besides which there were book debts of the face value of about \$2,000. These values were fixed by the defendants' assignees in taking the inventory made by consent of all parties immediately after the assignment, and in pursuance of the agreement then made as is set out in the special case. The defendants' indebtedness was in round figures, \$20,000. On the 17th February, 1905, but after the plaintiffs had taken possession under their agreement, the defendants made an assignment for the benefit of creditors to the defendants Roach and Somerville, who under the arrangement to which I have just referred, sold the property and realized for it \$6,785.74, that is forty per cent. of the inventory value. and in addition they collected \$1,068.94 of the book debts. These sums are now in the hands of the assignees under the terms of the arrangement as representing the defendants' assets, to be dealt with accordingly.

The questions involved are by no means free from difficulties. Before going into a discussion of the three separate classes of liability into which the case naturally divides itself, I must say a word as to the agreement itself, because a question has been made as to its true construction. The defendants' counsel contended that the license contained in the 8th clause was confined to that part of the stock which might at the time of taking possession be on hand and have been supplied by the plaintiffs—their own goods—and not to stock procured elsewhere. That is not in my opinion its true meaning. Taken as a whole I think the contract means this: The goods were to be supplied—the word is not sold—to the defendants to enable them to establish and carry on a business on their own account. By express agreement, however, and as one of the conditions upon which the goods were supplied, the property in them was to remain in the plaintiffs until they were paid for. Notwithstanding the legal title was thus expressly reserved, the transaction necessarily involved an authority for the defendants to remain in possession of the goods until default and to sell them in the ordin-

any course of their business, for without that the whole object of the arrangement would have been defeated. Purchasers from the defendants therefore on delivery took the plaintiffs' legal title in the goods, whether the defendants ever paid the plaintiffs for them or not: *Dedrick v. Ashdown*, 15 S. C. R. 227; *MacPherson v. Moody*, 35 N. B. R. 51.

It is obvious therefore that it might happen that none of the goods supplied by the plaintiffs would be in the stock and yet the defendants would be considerably in debt to the plaintiffs for them. As a security for any indebtedness arising from transactions under the agreement, the plaintiffs were also to have the life insurance policies mentioned in clauses 2 and 3, and the benefit of the insurance mentioned in clause 4, and the right to take possession and sell given by clause 8, which I think covered the defendants' entire stock, book debts, and assets. Such an agreement is, I think, perfectly valid and one which this Court will aid in enforcing unless the statutes relied on by the defendants prevent it. This agreement was not filed either under the Bills of Sale Act nor under the Act relating to Conditional Sales; and the contention here is that for want of such registry the contract is void as against the assignees of the defendants. This raises three separate and distinct questions: (1) as to the goods supplied by the plaintiffs; (2) as to the goods procured from other merchants; and (3) as to the book debts. And somewhat different considerations arise as to each.

First, as to the goods supplied by the plaintiffs: How are they affected by reason of the contract not being registered? Assuming that this agreement is one of that class of documents referred to in the original Act passed in 1899 (62 V. c. 12), and which with some amendments was subsequently re-enacted as c. 143 of the present C. S. 1903, it was made some months before the original Act passed, and there is nothing to indicate that these Acts in their general effect were to be retroactive. The express provision in sub-s. 2 of s. 8 of the original Act, coupled with the requirements of s. 2 and other sections of these Acts, point to an entirely different conclusion. Apart however from this, these Acts have sole reference to competitive claims between the original vendor claiming by his reserved title and a subsequent purchaser or mortgagee from his vendee without notice and for valuable consideration. The failure to register only operates against the real owner in favour of a purchaser or mortgagee from

the vendee to whom the owner had given the possession and thus clothed him with the apparent ownership which possession carries with it. No purchaser or mortgagee is claiming here, and the Act does not invalidate the transaction in favour of an assignee in insolvency. So far, therefore, as c. 143 is concerned it has no bearing on this case.

Treating the agreement for the present solely in its relation to the plaintiffs' own goods, how is it affected by the Bills of Sale Act? The Act which was in force in December, 1898, when this agreement was made, was 56 V. c. 5, which, for all questions arising here, was re-enacted as c. 142 of the present C. S., and to that I shall refer. That Act only refers to mortgages or conveyances intended to operate as such, but conditional sales where the vendor reserves the title have never been considered within the scope of the Bills of Sale Acts; they are not mortgages: *McIntyre v. Crossley*, [1895] A. C. 457; *Ex parte Crainor*, 9 Ch. D. 420.

Such documents were made the subject of special legislation and the persons for whose protection the legislation was had and as against whom the documents were made void for non-registry are entirely different in the two cases. The two Acts were designed to remedy distinct evils. The first question, I think, must be decided in the plaintiffs' favour.

As to the second question, that is as to stock not supplied by the plaintiffs, they say (1) that the agreement was not within the Bills of Sale Act, and did not require registry; and (2) that if it was they took actual possession of the goods before the assignment was made, and in that way perfected their title and cured all defects arising from non-registry.

The original Bills of Sale Act, re-enacted as c. 75, C. S. 1876, defined the meaning of the expression "bill of sale" (s. 6), and among other things it was thereby made to include "power of attorney, authorities or licenses to take possession of personal chattels as security for any debt," a provision apparently copied from s. 4 of the Imperial Act. There is no similar provision in subsequent Acts. They contain no interpretation clauses and so the words in them must be given their ordinary and natural meaning. Section 2 of c. 142, upon which the whole question turns, relates solely to mortgages and conveyances intended to operate as mortgages of goods and chattels. Is this agreement included in that section, and did these defendants when they executed it convey by way of mortgage or with the intention that it

should operate by way of mortgage, goods and chattels? To answer this question it is necessary to see what the instrument really is, for I do not think it was intended to be anything different from what it really is. It conveys nothing—it does not profess to assign a present interest either in existing property or in property to be subsequently acquired. It is a mere authority, given for a valuable consideration, and, as I think, irrevocable, so long as any indebtedness existed by the defendants to the plaintiffs, on a certain condition of things arising to take possession of goods capable of identification and dispose of them, and out of the proceeds to pay themselves their indebtedness and account to the defendants for the balance. Can such a document be called a mortgage? I think not. In *Ex parte Parsons*, 16 Q. B. D. 532, Lord Esher, M. R., in speaking of a similar document, said: “That this document is not a bill of sale at common law cannot be disputed. The question is whether any statute has made it a bill of sale. It seems to me that it is a bill of sale under the Act of 1878, as being within the words of s. 4, a license to take possession of personal chattels as security for a debt.” That is the interpretation clause to which I have referred, and this decision would be a direct authority against the plaintiffs on this point if their rights were governed by the original Bills of Sale Act. That same clause provided that “declarations of trust without transfer should be included in the term bill of sale, and that fact is assigned by Mellish, L.J., in *Edwards v. Edwards*, 2 Ch. D. 297, as a reason for holding that equitable titles were within the scope of these Acts. In *Ex parte Official Receiver, In re Merritt*, 18 Q. B. D. at p. 232, Cotton, L.J., is thus reported: “A mortgage of personal chattels involves in its essence not the delivery of possession, but a conveyance of title as a security for the debt.” In the same case Fry, L.J., says: “A mortgage conveys the whole legal interest in the chattels—a pawn conveys only a special property, leaving the general property in the pawner; a pawn is subject in law to a right of redemption and no higher or different right of redemption exists in equity than in law; a mortgage is subject not only to the legal condition of redemption but to the superadded equity. A pawn involves transfer of possession. A mortgagee having the whole legal title to chattels can of course sell them at law.” See *Franklin v. Neates*, 13 M. & W. 481; *Ex parte Hubbard*, per Bowen, L.J., 17 Q. B. D. at p. 698.

These were cases of legal title where the property was in esse at the time, but precisely the same doctrine applies to equitable titles. Where the property to be affected by the instrument is not in existence at the time, a conveyance, which in terms conveys a present interest while it can give and does not give any legal title, does operate so as to pass the title in equity so soon as the property included in the scope of the instrument comes into existence: *Holroyd v. Marshall*, 10 H. L. C. 191.

Now what is the position of persons holding a security such as these plaintiffs have? They have no conveyance of any kind; they have no contract for any conveyance. They have simply an authority to take possession and sell and until they have actually exercised that authority by taking possession they have no title. The defendants, up to the time of possession being taken, had both the title and possession of these goods. In *Congere v. Eretts*, 10 Ex. 299, it appeared that a debtor gave a bill of sale by which he conveyed to his creditors by way of security certain crops and other chattels. In addition to this the mortgagee was authorized as a further security to take possession of and sell after acquired property which might be brought on the premises. There was as to the latter no assignment of it, but only as here a license to take possession and sell. Park, B., in giving the judgment of the Court, says: "If the authority given by the debtor by the bill of sale had not been executed it would have been of no avail against the execution. It gave no legal title nor an equitable title to any specific goods; but when executed, not fully and entirely, but only to the extent of taking possession of the growing crops, it is the same in our judgment as if the debtor himself had put the plaintiffs in actual possession of these crops. Whether the debtor gives the possession of a chattel by delivering with his own hands or points it out and directs the creditor to take it or tells him to take any he pleases for the payment of his debt by the sale of it, the effect, after actual possession by the creditor, is the same." In *Reeve v. Whitmore*, 4 DeG. J. & S. 1, it appeared that an assignment of existing chattels by way of mortgage had been made, accompanied by a license to the mortgagee to enter and seize after-acquired chattels, and it was held that it neither operated as an equitable assignment of the after-acquired chattels nor did it give the mortgagee any present equitable interest in them. Lord Westbury says: "If there had been either upon the face of the deed expressly,

or there could have been collected from the provisions of the deed by necessary implication, a contract or agreement between the parties that the mortgagee should have a security attaching immediately upon the future chattels to be brought on the premises, the mortgagee would have had a present interest in all those materials whether manufactured or raw which after the date of the security might have been brought on the brick field. A present contract that the mortgtgee shall have a right and an interest attaching immediately by force of the contract upon all that property which in future may be brought on the premises is clearly different from a contract that the mortgagee shall have a power of entering upon the premises for the purpose of seizing and taking possession of that future property; and I think that the true extent and operation of the deed now before me was simply this, viz., that the mortgagee has passing to him by virtue of the contract a right to and a security on and an interest in all the property in existence at the date of the contract and that the security is accompanied by a power enabling him at any time to enter upon the premises and take the future property that may be found there. A power, however, is very different from an interest, and if the extent and limit of the contract be merely that the mortgagee shall have such a power, then an interest will not arise under the power till the power is exercised." It is obvious therefore that there are numerous and substantial distinctions between the rights and remedies acquired by a mortgagee of chattels and a mere licensee such as the plaintiffs are. See *Patterson v. Kingsley*, 25 Grant 425.

It may be said that instruments by which creditors are authorized to take possession of their debtor's goods and sell them in order to realize their debt, though not mortgages in form nor in all respects mortgages in their effect are, nevertheless, as capable of being used for the disposal of the debtor's property as a mortgage can be, and therefore unless registered they lead to precisely the mischief which Bills of Sales Acts are designed to prevent. That may be so, but that cannot convert such instruments into mortgages especially in construing a statute from which the legislature apparently by design omitted an interpretation clause which would have covered the case. In *McIntyre v. Crossley*, 15 App. Cas. 457, a discussion arose over a hire agreement by which the chattels were to remain the property of the lessors until paid for, and it was sought to establish the proposition that the instrument was a mortgage and void for non-registry under the Bills of Sale

Act. Lord Herschell says: "No doubt to some extent that may have the effect of giving to the sellers a security such as they would have as mortgagees. It may, to some extent, as I say, give them that security, but I know nothing to prevent such a contract as that being made or having full effect given to it. If a contract of that description is within the mischief of the Bills of Sale Act, then the Bills of Sale Act needs amendment. I do not say whether it is so or is not, but it seems to me impossible to bring this case within the Bills of Sale Act because the transactions may bear a resemblance to a transaction which would be within it on the ground that it is within its mischief when the initial step to bringing the Bills of Sale Act into operation at all fails, namely, that there should have been an assurance, or an assignment of a license to seize or any of the other matters referred to in the Bills of Sale Act given by the bankrupt to some other person."

This case does not therefore come within s. 2 of the Act. Is it within s. 7? That section provides that mortgages of chattels given to secure advances to be made to a person to enable him to enter into or carry on a business, unless executed in a certain way and filed in the registry office, shall be void as against certain persons. Assuming that the word "advances" includes goods as well as money, the argument is answered simply by the fact that the plaintiffs have no mortgage and do not claim to have one.

It is unnecessary in my view to consider the effect of an actual taking of possession of chattels by a mortgagee whose mortgage is not registered. Whether such a possession taken before the rights of third persons have intervened cures the failure to register is a question upon which it is unnecessary for me to express an opinion, as I think the title of the plaintiffs is not affected by the Bills of Sale Act. It is admitted that they did take actual possession on 17th February, 1905, before the defendants executed their assignment. There is no question as to the right to take possession having accrued to them at that time under the license by reason of the defendants' default, and as a result of that possession the plaintiffs' title became absolute to the chattels and property seized, which admittedly included the remainder of the stock and fixtures. The plaintiffs are therefore entitled to the money represented by their sale.

This brings me down to the last point as to the moneys represented by the book debts. In the first place, does a

license to take possession of book debts and dispose of them for the purposes of realizing money to pay an indebtedness create a right capable of being enforced? Book debts are neither goods nor chattels; they are not capable of transfer by delivery and are not within the scope of the Bills of Sale Act. That future book debts may be assigned so as to create an equitable interest in them is settled by authority. *Tailby v. Official Receiver*, 13 App. Cas. 523, determines that. In case of an assignment of book debts or choses in action, whether they are then in esse or are to be acquired at a future time, it is necessary, in order to perfect the title, that notice should be given to the debtor. Without that the debtor is not bound, and a payment by him to his creditor would be good. If, therefore, the assignee wishes to transfer the debtor's liability to a liability to himself, he must give notice of the assignment to the debtor. That is analogous to the case of an assignment of future acquired chattels—the contract itself assigns a present interest which, on the chattel coming into existence, fastens upon it. In the case of a mere license to take possession as here, there is no such assignment—the efficacy of the right consists in the execution of the power. That it was the intention of these parties that the book debts should be made available for the purpose of paying the indebtedness to the same extent as the chattels is beyond question. And in such a case the precise form of the instrument used for the purpose is immaterial. In this case it has taken the form of a license, but why should that prevent their intention being carried out? The case which I have just cited, *Tailby v. Official Receiver*, arose out of a debt paid by a debtor to whom notice had been given. Lord Watson says: "In the case of book debts, as in the case of choses in action generally, intimation of the assignee's right must be made to the debtor or obligee in order to make it complete. That is the only possession which he can attain, so long as the debt is unpaid and is sufficient to take it out of the order and disposition of the assignor." Lord Macnaghten says (p. 548): "Yet no one can doubt that if Izon (the bankrupt) had attempted to receive outstanding book debts after the mortgagee had intervened, the Court would at once have lent its assistance by the appointment of a receiver." What constitutes a taking of possession must of course vary according to the nature of the property being dealt with. I can see no reason, however, why an assignee of book debts cannot as completely perfect his title to them by

giving notice to the debtors as he can to chattels by taking actual possession of them. [Reference to *Dearle v. Hall*, 3 Russ. 1, and *Ryall v. Rules*, 1 Ves. Sr. 371.] I cite these cases chiefly to shew that book debts are a species of property of which possession, or at all events what this Court regards as equivalent to possession, can be taken by giving notice to the debtors. There was therefore in point of law no difficulty, so far as I can judge, in the way of these plaintiffs acting under their license and perfecting their title to the book debts by giving notice of their right to the debtors requiring them to pay to them as assignees, and in that way seizing and taking possession of these debts. In fact neither the plaintiffs nor the assignees gave notice to the debtors except what may have been done under the arrangement which was made. The case, therefore, resolves itself into a contest between the plaintiffs on the one side and the assignees on the other, as to which of them has the superior right to the fund. When I say the plaintiffs gave no notice to the debtors, it must not be thought that they remained inactive. It is necessary to determine the relative position of these parties at the time the assignment was made. On the 2nd February, 1905, the plaintiffs commenced this suit with the object of enforcing their rights, and among other things compelling the defendants to permit them to take possession of the goods and restraining them from collecting the debts, the defendants at that time being in default, as was alleged, and as the admission seems to shew was the fact, and asking for a receiver. On that day an ex parte interim order was granted restraining the defendants from assigning the property and from collecting the debts. This order ran until the 21st February, at which time the plaintiffs had leave to move to continue it. On the 16th February the defendants (that is *Morrell & Sutherland*) moved to dissolve or vary the injunction, and after hearing the parties, I did on the 17th February vary the order so as to permit the defendants to make an assignment for the benefit of creditors, which, it was alleged, they were anxious to do. They accordingly made the assignment on that day. On the 21st February the plaintiffs amended their bill by adding *Roach and Somerville*, the assignees, as defendants, and adding the allegation necessary to shew the change of interest. On the 3rd March the plaintiffs on notice moved, among other things, for a receiver, and in consequence of a discussion which then took place between counsel who represented not only parties to the

suit but individual creditors as well, Sheriff Ritchie was by consent added as one of the assignees and the arrangement as to taking stock and selling it was arrived at. The plaintiffs then further amended their bill by adding the sheriff as a defendant and adding the necessary allegations as to his appointment and the arrangement for the disposal of the assets. This, of course, obviated the necessity for further action until the fund should be in hand for distribution. So far as the assignees are concerned, it is admitted that when the assignment was made both of the assignees had notice that the plaintiffs claimed the stock and assets under the agreement and that Somerville had previously seen the documents particularly mentioned in section 3 of the case, that is the agreement and some correspondence which took place between the plaintiffs and defendants about the time the arrangement was made, and knew their contents, and so far as the book debts were concerned they must also have known that the defendants had been restrained by injunction order of this Court from collecting them, and that but for the arrangement aimed at, the Court would also have restrained them as assignees from collecting them. Some question has been made as to the title of the assignees being superior to that of the defendants whose title they took. There are, of course, cases in which the assignees can set aside certain so-called fraudulent transactions in reference to the insolvent's property which he could not himself call in question, and in that way acquire property for the creditors which otherwise would not have been available for general distribution. This is not one of those cases, and the assignees here took this property subject to the equities to which it was subject in the defendants' hands at the time. And I think this would have been the case whether the assignees had notice or not: *In re Atkinson*, 2 DeG. M. & G. 140; *In re Barnes' Trusts*, 4 K. & J. 227; *Tailby v. Official Receiver*, per Lord Fitzgerald, 13 App. Cas. at p. 538. When this assignment was made the plaintiffs, in reference to these book debts, had an irrevocable authority from the defendants to take possession of them and collect them in order to pay themselves a debt for the non-payment of which the defendants were in default. The voluntary assignment made by the defendants for the benefit of their creditors could not, in the absence of some statutory authority for the purpose, deprive the plaintiffs of their right and hand over the debts to the assignees for the benefit of the creditors generally. The plaintiffs had lost no

right by laches. Immediately on their right accruing, by giving notice of their dissatisfaction at the manner in which the defendants were carrying on their business, they attempted to assert their rights and take possession. The defendants in disregard of their contract hindered the plaintiffs from taking possession, and they then sought for the interposition of this Court in aid of their rights. I should be disposed to think that where a suit is instituted as this was long before the assignment was made, having for one of its objects the appointment of a receiver to take possession of the property and have the rights in reference to it determined and admitted by this Court, the plaintiffs were active in trying to obtain possession, and at all events had rights superior to those of voluntary assignees of the debtor who had been enjoined from collecting them. The rule in such cases is that the equities of the parties ought to be determined by a reference to what might have been done by any one of them under the powers given them, and their priorities will be regulated in reference to these powers: *Reve v. Whitmore*, 4 DeG. J. & S. 1, which is an authority for holding that if these assignees were subsequent incumbrancers for value with notice of the plaintiffs' rights, the plaintiffs would have a prior equity. A fortiori they would have one over mere voluntary assignees of an insolvent.

It is in this case agreed that in case this Court is of opinion that the plaintiffs are under the agreement and facts entitled to have possession of all of the goods, chattels, assets and book debts and choses in action, then an order is to be made for the payment over to the plaintiffs of the money in the assignees' hands. There will be an order to that effect. As to the judgment it is, I think, unnecessary to say anything. The judgment creditor is not claiming here; he is not a party to the suit, and the effect of s. 9 of c. 141 is to give the assignment priority over the judgment.

As to the costs I do not think, under the circumstances, I ought to make any order. The plaintiffs get the entire estate. I also reserved the question of costs of varying the injunction and as to those I shall make no order either.

There will be an order for the payment of the whole fund to the plaintiffs.

QUEBEC.

DUNLOP, J.

JANUARY 1ST, 1907.

MORGAN-SMITH v. MONTREAL LIGHT, HEAT AND
POWER COMPANY.

*Contract—Order for Special Machinery—Refusal to Accept—
Damages.*

DUNLOP, J.:—This is an action brought by the plaintiffs, a company doing business at York, in the state of Pennsylvania, in the United States of America, against the Montreal Light, Heat & Power Company, for the sum of \$42,783.93, claimed as damages caused to plaintiffs by defendants' breach, abandonment and repudiation of a contract entered into between the plaintiffs and defendants at Montreal, on the 7th of April, 1902. Plaintiffs claim that the defendants have repudiated and abandoned said contract, and prevented plaintiffs from carrying it out, and that they have a right to proceed in damages, as they have done by the present suit.

The contract was to deliver a large quantity of materials and machinery at Ste. Therese, in the province of Quebec, to be used in certain works of water power development, which the defendants proposed constructing at that place. A synopsis of the pleadings is given in the judgment as drawn, and it is unnecessary to recite them here, as they are very voluminous.

The company defendants contend that the obligations assumed by the plaintiffs under the contract in question regarding the delay for delivery, the test to which the machinery was to be subjected, the guarantees and the acceptance of the material, were of the essence of the contract, and conditions precedent to any action by the plaintiffs for the price, and that defendants would never have entered into said contract unless the plaintiffs had so undertaken, and that plaintiffs have not fulfilled the obligations assumed by them.

The defendants also contend strongly that they have never repudiated or abandoned the contract. The real controversy, as I view this case, is as to whether there was a repudiation of the contract. Mr. Cooper, who was employed

by the defendant company, says that the contract was not abandoned, owing to the sufficiency of the test at Holyoke. It may be said that Cooper was employed by the company defendants to make a report on all their works at Ste. Therese, and of the scheme which was being initiated there for the development of water power, and that he condemned the whole scheme, and advised the company defendants to make the best terms they could with their contractors, as appears by his report sent to the company of date 12th February, 1903; and it appears they have settled with one contractor, but have refused to pay the plaintiffs any sum of money whatever.

There is one thing certain and that is that at the time of the writing of defendants' letter to plaintiffs demanding the guarantees therein mentioned, both plaintiffs and defendants looked upon the contract as being in full force and effect. This was the interpretation put on the contract by both parties. This letter was written on the 17th of November, 1903, and this appears also from a minute of the executive committee of the company defendants on about the same date, wherein it is stated that a letter had been written by the company defendants to the company plaintiffs to delay further shipment of the machinery.

The evidence discloses that the works at Ste. Therese were an adjunct or auxiliary to the principal works at Chambly. This is what is termed in the evidence a booster proposition. On the 30th of November, 1903, the Chambly dam was carried away, and it is proved that after that date practically no work was done at Ste. Therese, and it is also proved that a large travelling crane which, under the terms of the contract, the plaintiffs had the right to use in carrying out the contract, was sold by the company defendants. Cooper's report condemning the whole scheme is dated the 12th day of February, 1903. Macklin, the engineer who had originally approved of the Ste. Therese scheme of development, was dismissed by the company defendants about October, 1902, about four months previous to the date of Cooper's report. It is also in evidence that Mr. Walbank, the company's engineer, condemned the whole Ste. Therese scheme. Early in January, 1903, a considerable portion of the machinery and materials called for by the contract were delivered by plaintiffs to the defendants in Ste. Therese, and accepted by the company defendants, but this acceptance was subsequently repudiated. Subse-

quently, the company defendants notified the company plaintiffs to ship certain wheels to be tested at Holyoke in the United States. This was done on the 27th of March, 1903, in a satisfactory manner, shewing, as I view the case, that the machinery tested complied with the conditions of the contract. This test was also approved by Mr. Cooper's representative, who was present when the test was made. It will be seen from Cooper's report hereinafter referred to that he states that the second error in the Ste. Therese scheme of development was in contracting for water wheels wherein the contract specifies that the speed and power were to be developed under full gate. This must be taken into consideration in judging of the sufficiency of the test made at Holyoke on the 27th of March, 1903.

A second test was made in the beginning of September, 1903, at the instance of the defendant company for their own purposes, and was not, as I view the case, in any way obligatory on the plaintiffs. Cooper admits that the test was not a fair one under the circumstances under which it was carried out.

The next step taken in the matter was that the company defendants, on the 17th of November, 1903, notified the company plaintiffs that it refused to accept the machinery and work then in the course of manufacture, or to permit its installation unless the company plaintiffs would become responsible, and guarantee the sufficiency and adequacy of the whole plant as designed by the company defendants, its officers and employees, and would assume and accept the liability imposed on builders by articles 1688 and 2259 of the Civil Code of Lower Canada, not merely in respect of the work to be done to the machinery and materials to be furnished by plaintiffs, but in respect of the whole plant in the designing and construction of which plaintiffs had no interest or part, and in which it was in no way concerned under its contract of the 7th of April, 1902, the whole as set forth in a letter addressed by the defendants to the plaintiffs, whereof a copy is filed. Subsequently, on the 12th of December, 1903, and the 12th of January, 1904, the plaintiffs formally notified the defendants of their refusal to accept any such conditions and obligations as mentioned in their letter of the 17th of November, 1903, and stated that it intended to complete the contract and notified the defendants to hasten preparations for the reception of a large portion of the machinery, which had

long since been ready for delivery, and the plaintiffs did shortly afterward, about the 17th of February, 1904, ship to the defendants a considerable portion of the machinery manufactured by them under the contract. In reply, the defendant company notified the plaintiffs, absolutely refusing to accept the said material and machinery unless the plaintiffs would assume the guarantees referred to in defendants' letter of 17th November, 1903. On the 8th of April, 1904, plaintiffs formally notified the defendants that it was, and had been for some time, in a position to immediately complete the delivery, erection and installation of all the machinery called for by the said contract of April 7th, 1902, and that in view of the defendants' refusal to accept or pay for said work unless the guarantee asked for was furnished, the plaintiffs would consider defendants' repeated refusal to allow the completion of the said work as a repudiation of the said contract, to which notification defendants made no reply.

It will be seen that defendants refused in the most positive terms on the 22nd of February, 1904, to accept the machinery. Plaintiffs had notified them on the 21st of February, 1904, advising them that they had shipped to them on the 17th of February, 1904, three railway car loads of water-wheel machinery, in fulfilment of the contract, and in reply received from the company defendants a letter in the following terms:

"I beg leave to acknowledge receipt of your letter of the 18th instant, advising that you have shipped three cars of water-wheel machinery for the Ste. Therese plant. As advised you previously, you are shipping the material at your own risk, and unless we get the guarantee we asked for, we will not accept the same."

If a party to a contract for the delivery of a quantity of machinery imposes on the contractor great responsibilities not mentioned or justified by the contract, rendering it impossible for the contractor to carry out the contract, this appears to me to be a complete repudiation of the contract, and this is what has been done in the present case.

The letter from Mr. Etnier, secretary of the company plaintiffs, makes clear the position of the company defendants. This letter is dated the 8th of April, 1904, and is in the following terms:

"As you have expressed your verbal intention not to accept our written proposition of March 30, 1904, submit-

ted at your request for furnishing turbine wheels for your Lachine plant, making use as far as possible of the turbines and materials intended for the Ste. Therese plant under contract of April 7th, 1902, and also for cancelling the said contract, and as you have likewise decided not to accept our proposal made on April the 6th, 1904, at your request for storing the undelivered turbines and materials for you at York, Pa., instead of erecting them, we beg therefore to advise you that each of said offers is withdrawn. We shall therefore stand on our rights under the agreement of April 7th, 1902, and in this connection we beg to repeat that we shall sign no guarantees except those specified in said agreement. We have sufficient materials and machinery at your power site at Ste. Therese and Richelieu, to commence the erection of the turbines on your foundations in accordance with your contract of April 7th, 1902, and the balance completed and ready to ship as fast as the same can be used. Our erecting man, Mr. Lockman, has been, and is now there for that purpose. We find the foundations are not sufficiently advanced to receive the work. In view of this, and in view of the correspondence, especially of your letter of January 1st, 1904, in which you state that you will not accept or pay for our wheels and material if erected. please advise me at once at the Windsor Hotel if this inference is correct, as otherwise we shall assume that it fairly sets forth your position and that you have repudiated the contract, and we shall bring action against you for damages."

No reply was made to this letter, although it was made perfectly clear to defendants that a failure to reply to it would be considered as a repudiation of the contract, and an action in damages was instituted.

It might be noted that the first plea of the company defendants was that the company plaintiffs did not manufacture or deliver in the time called for by the contract. As I understand the case, this plea must disappear. This was not of the essence of the contract in any shape or form. The company defendants had called for considerable alterations in the levels of the power house, and in other respects. These alterations caused a certain amount of delay, but whatever delay may have been caused, was absolutely and entirely waived by the defendants by the stand they took. The so-called delay lapsed on the 7th of December, 1902, that is to say, within 210 days after the contract was

signed, but the following January the company defendants asked the company plaintiffs by their telegram and by their letter, to stop work on the wheels, and to delay shipment pending tests, and to do certain things pending the return of Mr. Cooper. As I view the case, there has been an absolute and complete waiver of any delay, and that waiver has been recognized by the company defendants.

With regard to the lipped gates, I think the evidence of Mr. Macklin completely disposes of this. He was interrogated, in part, as follows:

Q.—Now, Mr. Macklin, would you tell us what you did state with regard to what was said to you by Mr. Etnier as to the regulation or the use of lipped gates, this morning?

A.—My recollection of it was that the wheels that were supposed to be put in at Ste. Therese would be an improvement on those at Chambly.

Q.—With reference to what?

A.—With reference to the lips on the gates.

And further on he is asked:

Q.—To regulation?

A.—No, not regulation, but with reference to lips on the gates, and they were to be put in better shape than they were at Chambly.

It will be seen that Mr. Macklin for the second time makes the unqualified statement that he as the chief engineer of the company defendant was assured by Mr. Etnier, secretary of the company plaintiffs, that his company would be in a better position as regards regulation at Chambly, and that lips would be used on the gates in the new construction at Ste. Therese.

The report of Mr. Cooper, dated the 12th of February, 1903, produced by Mr. Holt, when examined on discovery has a material bearing on this case, as it clearly demonstrates that from that date the company defendants absolutely abandoned the Ste. Therese scheme. It is unnecessary to read at length this report, but it commences in the following words, being addressed to the directors of the company defendants:

“Gentlemen,—I have examined the plans that have been prepared for this construction (referring, of course, to the Ste. Therese scheme), and I have examined the location for the proposed works, and I am familiar with the design and with the work done to date. As a result of the foregoing examinations, I regret the necessity of having to inform you

that in my opinion the scheme of power development at Ste. Therese has been founded on so many errors, for which there seems to be no cure, that in my opinion a further expenditure of money at Ste. Therese in the direction of power development would be useless." And further on he states: "The first error that was made in this design was the attempt to build too large units. The second error was in contracting for water wheels, wherein the contract specifies that the speed and power were to be developed under full gate, where the specifications should have been in this case that the speed and power should have been taken off at not more than six-tenths gate in order that the regulation might be permissible and that differences in head might be taken care of."

In addition to Mr. Cooper's report, condemning the Ste. Therese scheme, it would appear that Mr. Pringle's firm was retained by Colonel Henshaw, one of the directors of the company defendants, to make a report on the conditions at Ste. Therese, and that they did make such a report, and that it was also unfavourable. Mr. Henshaw, the former secretary-treasurer of the company, testified that the report was read by him at a directors' meeting, that it was brought to the knowledge of the whole board of directors of the company, and that it created "such a stir that it sort of delayed matters." He was asked why the report was not entered in the minutes, and he answered: "The report was not entered in the minutes because they did not want to create a tempest in a teapot before anything did come out." It is evident, therefore, that there is absolute evidence that a report was made by Pringle and Son, and that it created a stir.

Another defence set up to plaintiffs' action is, that under the contract the plaintiffs were bound to give a bond to the defendants, which they had not given, and that the giving of this bond was a condition precedent to any action being taken by plaintiffs. It does not appear that the plaintiffs refused to give this bond, nor is it established that the giving of such bond was a condition precedent to the taking of the present action. It seems to me that the defendants were wrong in not taking the advice given by their engineer Mr. Cooper in the first instance, to settle with the different contractors, and amongst others with the plaintiffs, as he distinctly advised.

On the whole case, I am of opinion that the company defendants repudiated and abandoned the contract in question, and that they are consequently liable to the plaintiffs in damages.

The plaintiffs contend that on the question of damages, the defendants did not see fit to adduce any evidence, and they submit they are entitled to the whole amount of the contract price, less certain deductions, which Mr. Smith, the vice-president of the company plaintiffs, has himself allowed in the form of credits given in the action, and to that must be added the costs of the governors, less the amount which Mr. Smith says he is bound to suffer on the resale of the governors. The plaintiffs further contend that the cost of these governors was about \$8,610. Mr. Smith says he thinks he can sell the two larger governors at a loss of from \$1,200 to \$1,600, and that the loss on the two small governors would be \$400, and that practically the loss on the governors is \$2,000, and that credit should also be given for the value of the materials to the company plaintiffs as scrap iron, which value Mr. Smith says is \$12.00 a ton, making a total value of \$2,826 for 335 tons, which he contends the plaintiff company would be obliged to break up and put in their furnaces.

The plaintiffs contend that after allowing these credits, the company plaintiffs are entitled to a judgment for \$33,347.93 instead of the full amount sued for.

It has been strongly contended by the defendants that it was the duty of the plaintiffs to minimize the damages in every possible way, by selling the material and machinery that was delivered, while the plaintiff company on the other hand contend that it was none of their business to find a purchaser, that the machinery consisted of special wheels, which they contracted to sell the company defendants, and for which the company defendants agreed to pay a certain sum of money, and that the machinery in question is not an ordinary article of commerce that can be sold on the market.

The witnesses, Kennedy and Lea, both scout the scrap-iron theory, and they say the wheels must be worth a great deal more than scrap iron, because they can be adapted to different heads, but it may be observed that this was only an expression of opinion, and no witness has come into the box and contradicted the evidence of Mr. Smith, who stated that these wheels were worth so much, and no one has stated that there is a purchaser for these wheels giving his name.

and the amount he would pay, while Mr. Smith distinctly stated that as far as the plaintiff was concerned, the material was of no other value than as scrap.

The obligation of the defendant company was to pay for what they bought. They have had delivered to them a certain part of the material, and there has been a repudiation of the contract. For one or more of the elaborate reasons by them given from time to time, they have refused and rejected the wheels, and have thrown them back on the hands of the plaintiff.

I am of opinion that under the law and under the authorities which will be hereafter cited, the company plaintiffs were not obliged to go out on the market and sell the wheels, that they were not obliged to take the risk of selling them to somebody who might pay for them, that they were not obliged to send all over the country to find out the different heads of water where these wheels might be properly used. The plaintiff company contracted to give the defendant company special wheels, to meet a special set of circumstances. The company defendants have abandoned their enterprise at Ste. Therese, and have thrown the special wheels back on plaintiffs' hands.

It remains to be seen whether the plaintiffs' action is well founded, and if so, for what amount they are entitled to judgment.

As to the form of action, the company defendants contended that the plaintiff company ought to have tendered the wheels, and renewed the tender in an action they might bring.

Plaintiff company is a firm doing business five or six hundred miles from Montreal, furnishing materials that weigh some 450,000 pounds. They have a lot of this material lying on the banks of the Richelieu, and it has been lying there for the last three years, from January, 1903, to March, 1906. The company defendants refused to have anything to do with this material unless the company plaintiff would guarantee that the whole of their installation at Ste. Therese would run satisfactorily. Under the circumstances, what could the plaintiffs do? What was the use of a tender to people who say "You can tender, but so far as we are concerned we won't accept?" If an action had been taken for the price, and the material tendered, the answer would have been, we have refused your tender long ago. The company defendants denied that there ever was

an effective contract after a certain date, and that they had repudiated the contract and denied their liability to take the material, and that plaintiff's recourse was an action in damages.

It appears to me that under the circumstances and conditions of this case, a tender was absolutely unnecessary and that the only possible action was an action for damages. If the defendant company insist and persist in the stand they have taken in this matter to repudiate this contract and to say in effect, "Keep your material. We don't want it. We won't take it," it would appear that the appreciation of value that the plaintiff company put upon the material is the proper appreciation. The plaintiff company has proved that the material and wheels contracted for were thrown back on their hands, and that it has to them value as scrap iron only. The plaintiff company refer to cases which are mentioned in *Mayne on Damages*, citing the 6th edition, from page 176 to page 180, wherein are cited cases referring to the obligation of the purchaser, or the obligation of the vendor where a contract of sale has been repudiated, to take the necessary steps to mitigate the loss, and this author deals with just the difficulty that has arisen under circumstances similar to those raised in the present case. He says:—"But is the plaintiff bound as a matter of law to do anything in an action for breach of contract to supply a cargo. *Martin, B.*, said, "It would be doubtful whether a party who breaks a contract has a right to say to a party with whom he breaks it, 'I will not pay you the damages arising from my breach of contract, because you ought to have done something else for the purpose of relieving me of it.' I am not satisfied that the person who breaks a contract has the right to insist on that at all, but if the ship had earned anything the defendant would be entitled to a reduction in respect to that. I am not prepared to say that the person with whom the contract is broken is bound to go and look for employment for a ship when the freight has been lost by reason of that breach of contract. It seems to me that that matter ought to be dismissed entirely from consideration." Then he goes on to say at page 181: "But the court denies that the plaintiff was under any such obligation. *Kelly, C.B.*, pointed out that the defendant might fairly say that the plaintiff had no right to enter into a speculative contract and might insist that he was not called upon to pay a greater differ-

ence than would have existed had the plaintiff held his hand."

The plaintiff company contend that they dare not make a speculative contract for themselves for the material they had on hand, and that they dare not, under the circumstances, go to the expense of having these wheels re-adjusted and rebuilt to suit another condition of affairs that might or might not ever exist, for which they might or might not ever have an order. They also contend that the wheels may be on their hands for an unlimited time, and that there is no purchaser in sight. None was suggested by the company defendants, nor did they suggest any market, nor did they establish any market price. It seems to me under these circumstances that the court is bound to adopt the value that plaintiffs have put on it, that is, the value to them as scrap, inasmuch as the machinery and materials had been thrown back upon them through no fault of theirs, but by the fact that the company defendants failed to take the good advice given to them by their engineer Cooper, in the first instance, that they should make the best settlement they could with the contractors, of which the company plaintiffs was one.

As I view the case, the plaintiff is entitled to damages for being prevented from completing its contract and receiving the agreed price, taking into account whatever the unfinished machines left on its hands were worth to it.

Reference might be made to Sedgwick on Damages, sec. 618, 8th ed., p. 270, and also to the case of *Black v. Woodrow and Richardson*, reported in Sedgwick's leading cases on the measure of damages, p. 377, and the cases cited in the report of said case, and amongst others to the case of *Cort v. Ambergate, etc., R. W. Co.*, 17 Q. B. 127, where there was a contract for the manufacture and supply of a certain quantity of railway chairs by the plaintiffs for the defendants to be paid for after delivery, and the defendants, having accepted and paid for a portion of the chairs, gave notice to the plaintiffs not to manufacture any more, as they, the defendants, had no occasion for them, and would not accept or pay for them. In an action upon the contract it was held that as the plaintiffs were desirous and able to complete the contract, they could, without manufacturing and tendering the rest of the chairs, maintain an action against the defendants for breach of contract. It was also held that the simple notice by the defendants to the plain-

tiffs that the latter should not go on to supply the rest of the chairs, entitled the plaintiffs to recover on an account alleging that they were ready and willing to perform the contract, and that the defendants refused to accept the residue of the chairs and prevented and discharged the plaintiffs from the further execution of the contract, that such notice by the defendants was a legal prevention, though there was no other act of obstruction.

So in the case of *Derby v. Johnson*, 21 Vt. 17. There the plaintiffs and defendants entered into a written contract by which the former engaged to do all the stone work, masonry, and blasting upon a certain piece of railway at certain specified prices, by the cubic yard. The plaintiffs entered upon the performance of the contract, and while they were so engaged the defendants gave them direction to quit the work and to do nothing more under the contract, and the plaintiffs having quit the work as directed, it was held to be no relinquishment of the contract on their part, but that the defendants, in giving the notice and stopping the work, were in the exercise of a right that belonged to them, leaving themselves liable, of course, for all consequences resulting from their breach of contract.

In the present case, the letter of the company plaintiffs of date the 17th of November, 1903, demanding the guarantees, was, in my opinion, a legal prevention, and the plaintiff company was thereby prevented by the sole action of the company defendants from completing their contract, which they were ready and had notified the company defendants that they were willing to do.

I am, therefore, of opinion that the company plaintiffs, by reason of defendants' breach, repudiation and abandonment of said contract, have suffered damages to a large extent, and for which the company defendants are liable, and the Court assesses said damages at the sum of \$33,347.93, the whole as appears by a statement embodied in the judgment as drawn.

Judgment will, therefore, go in favour of the company plaintiffs for this amount, with interest from service of process, and costs.

QUEBEC.

MATHIEU, J.

JANUARY 7TH, 1907.

EASTERN TOWNSHIPS BANK v. ROBERT.

Company—Shares—Subscription—Allotment.

MATHIEU, J.:—Plaintiff alleges in his declaration that at Montreal on the 3rd June, 1905, defendant subscribed for thirty shares at one hundred dollars each in the capital stock of the "Emporium Cigar Co., Limited," as follows: One-tenth in three months from 3rd June, 1905, and one-tenth each month thereafter until payment in full; that the said "Emporium Cigar Co., Ltd." transferred this credit of three thousand dollars and later, on the 13th December, 1905, the said company acting by its president, Robert Deschenes, duly authorized thereto by a special resolution of its directors, made a notarial transfer of said claim, passed before Boisseau, notary public, and which transfer was served upon defendant by the same notary on December 19th, 1905; the plaintiff concluded by praying that defendant be condemned to pay in the seven instalments due, on the 26th March, 1906, in all \$2,100, with interest at 6 per cent. from the due date of each instalment of \$300, and the costs. Defendant pleads that on the 3rd June, 1905, he offered to subscribe thirty shares of the capital stock of the said company, but that the company never accepted his offer, nor even allotted to him any part of its capital stock, and never gave him any notice of its acceptance of his offer or of its assignment of his offer, so that no contract was ever completed between him and the said company, and he, therefore, had never become a shareholder with said company; that by deed passed at Montreal the 21st February, 1906, before Lacasse, notary public, the defendant withdrew and countermanded his offer and repudiated all responsibility which might arise from his said subscription; that on the 23rd February, 1906, by deed passed before St. Germain, notary public, the defendant caused the said deed of 21st February to be served upon the said company, and on the same day defendant caused a copy of said deed of 21st February to be served upon plaintiff, and defendant concludes by praying for the dis-

missal of the action. In answer to the plea of defendant, plaintiff says that the writing signed by defendant embodies an absolute obligation on his part to pay for thirty shares of one hundred dollars each of the capital of said company, on the several dates mentioned in said writing, which was forwarded by the defendant himself to said company, which, on the same day, the 5th June, 1905, allotted the said shares to him and duly entered them in its books; that defendant was verbally informed that his offer had been accepted, and that the service of the transfer from the said company to plaintiff on the 13th December, 1905, was equivalent to an acceptance of said subscription; that the alleged repudiation and countermand by defendant of his offer is without any effect; that in the month of January, 1906, the said company became insolvent and was placed in liquidation, and that the defendant could not, only on the 21st February, 1906, withdraw from being a shareholder in said company. In reply to these allegations, defendant says that he has no knowledge of any entries the said company may have made in its books, and, in any event, said entries could have no effect as to him. The following facts have been established by the evidence: On the 3rd June, 1905, the defendant made the following writing:—

(Translation.)

“The Emporium Cigar Co., Limited.”
Incorporated by letters patent.

Montreal, 3rd June, 1905.

I, the undersigned, hereby subscribe for thirty shares of one hundred dollars each, of the capital stock of the Emporium Cigar Co., Limited, payable at the office of the Eastern Townships Bank, St. Hyacinthe, one-tenth three months from this date, and one-tenth every subsequent month until payment in full.

\$3,000.

Signed, Antoine Robert.

On the same day, the defendant forwarded the above subscription to R. Deschenes, the president of the said company, together with the following letter:

Robert's Country House,
180 St. James Street,
3rd June, 1905.

R. Deschenes, Esq., St. Hyacinthe.

Dear Sir,—I have much pleasure in sending you, herewith enclosed, my personal subscription for \$3,000. I have four for \$5,000 in view.

(Signed) Antoine Robert.

On the same day, 3rd June, 1905, the said company, by private writing, which does not appear to have been served upon the defendant, transferred its said claim against Robert to the plaintiff, by reason of said subscription as collateral security, for what it owed or might owe to plaintiff. On the 7th December, 1905, the directors of the company passed a resolution by which the said company ceded and transferred, absolutely and forever, as collateral security, to the plaintiff, whatever was still owing to said company in virtue of a subscription for thirty shares of one hundred dollars each of the capital stock of said company, said subscription bearing date of 3rd June, 1905, signed by defendant and payable at the office of the plaintiff, St. Hyacinthe, one-tenth in three months from date, and one-tenth every succeeding month until paid in full; which subscription was the same as the one already transferred to plaintiff, as collateral security, by private writing, dated 3rd June, 1905, and authorizing Robert Deschenes, the president of the said company, to sign any authentic deed deemed necessary for said purpose. By deed passed at St. Hyacinthe, before Boisseau, notary public, on the 13th December, 1903, the said Emporium Cigar Company, Ltd., represented by its president, Robert Deschenes, transferred the said asset of \$3,000, owing by Robert, in virtue of said subscription, to the plaintiff. This transfer states that it was made for good and valuable consideration. It was served upon defendant on the 19th December, 1905, by the ministry of said notary. By deed, passed at Montreal the 21st February, 1906, before Lacasse, notary, the defendant declared that he had subscribed for thirty shares of one hundred dollars each of the capital stock of said company, and that said company had never accepted said offer and subscription, and had never allotted said shares to him, and had never given him any certificate therefor, or any notice thereof, and that he withdrew the offer made by

him to become a shareholder in said company, and repudiated said subscription. The cancellation of his subscription was served upon said company the 23rd February, 1906, by St. Germain, notary public, and was served upon the plaintiff on the same day by Sylvestre, notary public. I am of opinion that the resolution of the directors of the company, of date the 7th December, 1905, and the transfer made by the said company to the plaintiff, as aforesaid, the 13th December, 1905, constituted an acceptance by the said company of the subscription made as aforesaid, by the defendant, seeing that the company could not transfer said credit without accepting defendant's subscription (argument of article 647, C. C.), and that the service of said transfer made on defendant on the 19th December last was, with respect to the defendant, a sufficient notice, on the part of said company, of its acceptance of the said subscription. I am further of opinion that the date of the resolution of the 7th December, 1905, served, as already said, upon the defendant on the 19th December, 1905, defendant's offer had not been withdrawn, as the defendant had admitted, by withdrawing said offer on 21st February, 1906, and that by the meeting of the will of defendant and of the company a contract was formed between them, binding the defendant to the payment of the shares so subscribed for by him. I am also of the opinion that after the completion of said contract, as aforesaid, the defendant alone could not, without the consent of the party with whom he had contracted, dissolve said contract and withdraw his subscription, as he claims he did by the deed passed the 21st February, 1906 (art. 1022 C. C.). It is also clear to me that while it may be necessary, in certain cases, to the creation of a contract between the subscriber for shares in a corporation and the corporation, that there be an allotment, if not of all, at least of some of the shares so subscribed for by him, particularly when the shares exceed the amount of the authorized capital, it does not follow that a contract, involving a subscription for shares in a corporation, cannot be made like any other contract between an individual who wishes to subscribe for these shares in a corporation and a corporation which is willing to allot them to him. I think that on the 19th December, 1905, there was a meeting of the wills of the parties, and, consequently, there was a contract between the defendant and said company; and that, from that moment, the defendant became the debtor of the said com-

pany for the said sum of three thousand dollars. I therefore consider defendant's plea unfounded, and I maintain plaintiff's action for \$2,100, with interest on the several instalments as prayed for in the conclusion of plaintiff's declaration, and I condemn the defendant to pay the costs.

QUEBEC.

PAGNUELO, J.

JANUARY 5TH, 1907.

NADEAU v. BANK OF TORONTO.

Bills of Exchange—Cheque—Deposit for Collection—Bankers by Error Collecting Less than Proper Amount.

PAGNUELO, J.:—Plaintiff claims from defendant \$274.50 for the following reasons: The 4th October, 1905, the plaintiff was the bearer of a cheque for \$250, signed by Edouard Nadeau, to the order of plaintiff, and drawn on the Hochelaga Bank, Joliette; the 5th October, 1905, plaintiff endorsed the cheque and transferred it to John Caldwell & Co., of Montreal, who deposited it, for collection, with the said Bank of Toronto, who credited the said John Caldwell & Co. with the said sum and remitted the cheque to the Banque Nationale, its agent at Joliette, with instructions to collect \$2.50 on the said cheque. In accordance with the said instructions, the Banque Nationale only collected \$2.50; at that time the drawer had sufficient funds at the Hochelaga Bank at Joliette to pay the full amount of said cheque, viz., \$250; there were also sufficient funds to pay it during the next few days; one month later, when the drawer of the cheque had become insolvent, and when there were no more funds in the said Hochelaga Bank, the plaintiff was notified by the defendant that he had been credited with said cheque simply to the extent of \$2.50, in place of \$250, and that the difference \$247.50 had been charged to John Caldwell & Co.; the latter, in turn, charged the plaintiff with the \$247.50; the plaintiff has not been able to collect the said sum from the drawer by reason of the fault, negligence and omission of the defendant, and it is responsible for the said loss suffered by plaintiff. The defendant pleaded that the said cheque was only drawn for the sum

of \$2.50 and it was by error that John Caldwell & Co. were credited with \$250; that as soon as they were notified of the error, John Caldwell & Co. had settled the matter by paying \$247.50 to the defendant, the difference; it denies having instructed its agent to only collect \$2.50; it had transmitted the cheque to its agent to collect it and its agent had collected the full amount of said cheque, namely, \$2.50; it denies or is ignorant of the other allegations of the declaration and maintains that plaintiff has suffered no damage through any fault on its part; the 12th October, 1905, the said Edouard Nadeau handed plaintiff another cheque for \$250, which was cashed, and, finally, plaintiff has never reimbursed John Caldwell & Co., and has no right of action against the defendant. The cheque is in the following form:—"Payez Victor Nadeau ou au porteur—\$2.50—Deux cinquante, 00,100 piastres." "Edouard Nadeau;" said cheque had been given for \$250, to settle a debt due by the drawer to the payee; the payee had transferred it to John Caldwell & Co. for value received and the clerk employed by said firm having drawn plaintiff's attention to the omission of the word "cent" and to the figures \$2.50, the latter replied that the cheque had been made for \$250 and that the drawer had sufficient funds in the bank to meet it; it was deposited in the bank defendant by John Caldwell & Co. at the value of \$250, and this sum was credited to John Caldwell & Co. in its letter, enclosing the cheque to the Banque Nationale, at Joliette, its agent, for collection; the bank defendant considered the cheque as one drawn for \$250; the cheque of the 11th October for \$250, cashed the 13th, is for another transaction; the 26th December, 1905, the defendant informed the Hochelaga Bank that it had instructed its solicitors to sue the Hochelaga Bank for the amount of the cheque of Edouard Nadeau to the value of \$250, or accepted by it and for which it had refused to pay more than \$2.50; John Caldwell & Co. and the plaintiff only knew one month later that the Hochelaga Bank had accepted the cheque only to the extent of \$2.50, and after the maker had become insolvent and had no more funds in the bank. It was only after receipt of the letter from the Banque Nationale of date the 4th November that the defendant was informed that said cheque had only been paid to the extent of \$2.50. The bank asked the Banque Nationale to send back the cheque for the purpose of examining it and on the 10th November the defendant

wrote the Banque Nationale that it had returned the cheque for \$250 to its customer, John Caldwell & Co., who would collect the amount themselves and that it had credited the Banque Nationale with the difference. It results from all the above stated facts that the defendant is in fault, after having received said cheque as of the value of \$250, to have remitted it to its agent as a cheque for \$2.50; that it should have claimed \$250 from the Hochelaga Bank, and if payment of that sum had been refused, it would have been its duty to notify the endorsers without delay and that it should have taken these proceedings after having accepted only \$2.50 for the cheque; that the defendant is also responsible for the delay which elapsed before notifying the endorsers that the said cheque had not been honoured by the Hochelaga Bank for the sum of \$250; that if the bank defendant had notified the endorsers within a reasonable time, the plaintiff might have been able to collect the full amount of the cheque; that the plaintiff was not able to claim payment of said cheque either from the Hochelaga Bank or from the drawer thereof within a reasonable delay. It was not proved either that the bank defendant has been paid the difference alleged by it to be due on said cheque by its customers, John Caldwell & Co., but it has simply charged them with it, and, in their turn, John Caldwell & Co. have done the same thing as towards the plaintiff. The letter of the 26th December, 1905, from the bank defendant to the Hochelaga Bank, clearly shows that at that date the defendant considered itself responsible towards the endorsers in the said sum of \$247.50. It is also evident that the bank could not settle with John Caldwell & Co. and be freed by them from all further responsibility on said cheque to the prejudice of plaintiff's recourse against it with respect to its quasi delict; the plaintiff was one of the endorsers of said cheque and had a right, therefore, to receive, within a useful delay, notice that the sum of \$247.50 had not been paid. The plea is dismissed, and the defendant is condemned to pay plaintiff the sum of \$247.50, with interest from April 10, 1906, and costs.

QUEBEC.

DUNLOP, J.

JANUARY 14TH, 1907.

THE ELECTRIC FIREPROOFING COMPANY v. THE
ELECTRIC FIREPROOFING COMPANY OF CAN-
ADA, LIMITED.*Patent of Invention—"Composition of Matter"—Novelty—
Anticipation.*

DUNLOP, J.:—In suit number 3079, the Electric Fireproofing Company, hereinafter styled for convenience the New York Company, versus the Electric Fireproofing Company of Canada, Limited, hereinafter styled the Canadian company; the plaintiffs seek to recover an amount of \$4,462.33 for overdue coupons attached to a certain series of bonds, 75 bonds of one thousand dollars each, issued by the company defendant. Besides this, there were certain commercial transactions between the two companies. The New York company purchased lumber from the Canadian company and it is admitted that there is a balance due the Canadian company on said lumber of \$5,653.14, and, if the plaintiffs are successful in the present litigation, judgment should go for the sum of \$4,217.67, being the balance due on the larger sum of \$9,870.81, the amount of interest on overdue coupons.

The cross demand in the suit number 3079 and the demand in the action number 1832, in which the Canadian company are plaintiffs and the New York company are defendants, and certain parties mis-en-cause, depends upon the validity or invalidity of two Canadian letters patent of invention, number 46781, issued to Lina Schuler on the 8th of August, 1894, and patent number 63671, issued to Barchert and O'Neil on the 25th of August, 1899. The defendants maintain that these two patents were sold by the New York company to the Canadian company through the intermediary of Messrs. Stillman & Hall, Limited, a New York corporation, who conducted the negotiations leading to the sale as brokers or agents. This company is a party to this suit, having appeared and declared that they submit to any judgment that may be rendered.

The tiers saisis in the suit number 1832 are the prothonotary of the Superior Court. Messrs. Foster, Martin.

Archibald and Mann, in whose hands these bonds were when attached by conservatory attachment, and which are now under the control of the court. The tiers saisis have appeared and declare that they hold these bonds except one. These bonds are secured by a deed of trust hypothecating the property of the Canadian company in favour of the Montreal Trust and Deposit Company as trustees for the bondholders. This trust company is also made a party to the action. The conclusions of the Canadian company ask that, inasmuch as the patents which form the consideration for which these bonds were given are invalid, that there is no consideration, and they demand that the bonds be declared null and void and be returned to the Canadian company and pray for the cancellation of the deed of trust.

By their defence to this action the New York company has taken what might be called a preliminary objection: namely, that they did not sell the patents to the Canadian company, but made the sale direct to Messrs. Stillman & Hall, Limited, and that the Canadian company purchased the patents from Stillman & Hall, Limited, but it will be seen from the correspondence, documents and evidence produced that the \$25,000 was paid by the Canadian company by means of a cheque to the order of Stillman & Hall, Limited, and was taken by Mr. Meldrum, representing the Canadian company personally, to New York, and there endorsed in his presence by Professor Stillman and handed direct to the New York company. The cheque did not remain one minute in the hands or in the possession of Stillman & Hall, Limited. That amount was handed to the New York company on the 10th of January, 1900, and then the assignment or preliminary agreement was drawn up which is filed as Exhibit D-11. Although that agreement is a preliminary assignment to Stillman & Hall, Limited, it recited the negotiations that had been carried on. The date of the agreement is the 10th of January, 1900. In that agreement it is specifically stated that, notwithstanding the agreement, the New York company will remain the owners of the patents until the Canadian company is finally formed, and have issued their bonds, and until the bonds are transferred, so that in the very agreement of Stillman & Hall, Limited, it results from its terms that Stillman & Hall, Limited, were merely the intermediary to facilitate the transaction.

It might be noted that according to the agreement, the \$75,000 of bonds were to be delivered on or about the 1st of August, 1900. When the 1st of August, 1900, came around, the organization of the Canadian company was not then sufficiently advanced to enable them to issue a proper bond, and temporary bonds were issued, which were not secured by any hypothec, and had no coupons attached. Practically it was simply the promissory note of the company, and these temporary bonds were subsequently exchanged for the bonds now in question, which were properly issued bonds of the company, validly secured on the company's property. We find that the actual assignment of the patents—that is to say, the formal assignment of the two patents for the purpose of registration at Ottawa—was dated the 3rd of December, 1901, establishing that the New York company held the patents until they got the bonds from the Canadian company, and then the transaction was completed. It is true it went through in the form of an assignment to Stillman & Hall, Limited, from Stillman & Hall to the Canadian company, but that was done simply for the sake of convenience, and Stillman & Hall did not get any of the bonds, nor any of the cash. Professor Stillman expressly stated that he was acting throughout as the attorney and agent of the New York company, and in his letter, Exhibit D—1, when he speaks “of our principals,” he was referring to the New York company. He was present at the payment of the \$25,000 and on the occasion of the delivery of the bonds, and explains the transaction in the manner above referred to. Being asked the following question: “Did you or did the corporation of Stillman & Hall, Limited, ever at any time hold either of the two Canadian patents in question in this cause or the consideration price paid for the same, except for the purpose of effecting their transfer from the Electric Fireproofing Company of New York to the Electric Fireproofing Company of Canada, the defendants in this case, in accordance with the agreement, and negotiations previously arrived at?” answered “No, sir.” I am, therefore, of opinion that there is nothing in this preliminary objection.

We now come to the real controversy in the case, namely, were these patents null and void? There are two patents involved in the case. One is the Lina Schuler patent, which is a patent for a new composition of matter, and the claim is as a new article of manufacture of fireproofing

composition composed of phosphate of ammonia and sulphate of ammonia in a solidified form, in about the proportion specified; the other is the Bachert and O'Neil patent, which is for a process. This process would appear to be first the enveloping of wood within a closed receptacle, in an atmosphere saturated with aqueous vapour, maintained at about a hundred and ten to two hundred degrees fahrenheit to soften and open the pores of the wood. Secondly, producing a vacuum and removing the vapour and water from the wood; thirdly, impregnating the wood uniformly throughout with the fireproofing solution under pressure; fourth, the drying of the wood at a temperature ranging from 85 to 125 degrees fahrenheit.

In order to understand how the sale of these Canadian patents was brought about, we have to refer to the evidence of Professor Stillman, who was examined as a witness for the Canadian company on the commission to New York. He states that his attention was directed to this fireproofing business by being called upon to examine into the matter for a Mr. Fox, who was purchasing the English patent for a large sum of money. Professor Stillman was an eminent chemist, and after examining these patents, he was so favourably impressed with the utility and efficiency of the composition process to be used for the purpose of rendering wood fireproof and was so satisfied that he approached Mr. Bachert, the vice-president of the American company, to see if that company did not have some territory that they could sell to him by which he could acquire the patents to make this composition, and to work this process. It is apparent that Professor Stillman had made an exhaustive study into this question of fireproofing. He had been required to make an examination into the composition and into the process by Mr. Fox, a gentleman, who, he tells us, was paying a large sum of money for the English patents, and as a result of his examination and research and the enquiry he made, coupled with his own general knowledge of the matter, he asked Mr. Bachert if he had any patents in any other countries to dispose of, and in that way the question of the Canadian patents came up. The evidence shews that Stillman & Hall, Limited, acquired an option on the Canadian patents from the New York company some time in May, 1899. Professor Stillman then came to Montreal and succeeded in interesting Mr. R. Wilson-Smith and Mr. Meldrum in this enterprise, exhibiting to them the fire-

resisting properties of the wood treated with this composition by this process, and he finally interested them in the matter so that they took it up.

The New York company contend that it was only when the Canadian company was asked to pay for the patents, which had been delivered to them, that they turned around and said that there are latent defects in the process, "and we don't want to pay you." It will be seen that what they acquired was the patent for this composition for rendering wood fireproof, and the patent to work this process. They acquired the monopoly against everybody else—a monopoly against every other Canadian to make that mixture, and to apply that mixture in that particular way, covered by that patent for the fireproofing of wood. They have enjoyed that monopoly. Nobody has ever disturbed them in that monopoly, and nobody has dared to attempt to use any one of these inventions in Canada. As I said before, the main question to be determined in this case is as to the validity of the patents. Section 7 of the Patent Act of Canada might be referred to. It enacts as follows: That any person who has invented any new and useful art, machine, manufacture, or composition of matter, etc., etc., may obtain a patent. Therefore, having reference more particularly to the Lina Schuler patent or the composition patent, we have to enquire, in the light of the well-known rules that have been laid down by patent authorities, and patent jurisprudence in patent cases, whether we have in this patent a new and useful composition of matter. Under an amendment of the Patent Act, which was passed in 1892, section 59, there was a provision made for a thorough and reliable examination to be made by competent examiners to be employed in the patent office for that purpose. It is in evidence, and it is, moreover, a well-known fact that a similar provision for examination prevails in the patent offices of the United States. Mr. Warfield, a witness examined on behalf of the Canadian company, takes the ground that the inventions claimed in the present case had been anticipated by patents issued in the United States.

The following authorities might be referred to as to compositions of matter: Walker on Patents, page 13, section 18: "The phrase 'composition of matter' as used in the statutes, covers all compositions of two or more substances. It includes, therefore, all composite articles.

whether they be results of chemical union or of mechanical mixture, or whether they be gases, fluids, powders, or solids.”

In Robinson on Patents, vol. 1, sec. 192, a composition matter is said to be an improvement formed by the intermixture of two or more ingredients possessing properties which belong to none of these ingredients in their separate state. The intermixture of ingredients in a composition of matter may be produced by mechanical or chemical operations, and its result may be a compound substance resolvable into its constituent elements by mechanical process or a new substance which can be destroyed only by chemical analysis.

These definitions are important, because it is contended by the Canadian company with regard to the composition patent, that there is no novelty and no invention in the composition or mixture claimed, because it is a mechanical mixture; but authorities can be cited to shew that a mere mechanical mixture is patentable.

The burden of proof in the present case was on the Canadian company to upset the two patents. There is a *prima facie* case made out by the issue of the patents to the applicants. In order to upset these patents, clear and positive evidence of want of novelty or utility must be adduced. Walker on Patents, paragraph 40, p. 44, says: “That when the other facts in the case leave the question of invention in doubt, the fact that a process or machine or other subject of a patent has gone into general use, and has displaced other processes or things which had previously been employed for analogous use is sufficient to turn the scale in favour of the existence of the invention.”

It is not claimed here that the inventors first invented or discovered the fire resisting properties of sulphate of ammonia, or phosphate of ammonia. What they do say is that they have invented a new and useful combination or mixture of these two fire resisting salts, which performs functions that the two constituents would not perform when used individually.

Dr. Ruttan was asked if he had ever used a mixture of sulphate of ammonia and phosphate of ammonia, or if he had ever experimented with the use of the two salts together, and he was forced to admit that he had not. He stated in his examination-in-chief that the properties of these two salts as fire resistants were well known. This does not seem to have been disputed, but the novel feature of the Lina Schuler patent was the mixture of these two

salts, which had never been practised before. It is admitted by the plaintiff that these salts were never used together and that the advantages of such a mixture are demonstrated in the evidence of Prof. Gladding in the experiments he made with the towels. He exhibited before the court three samples of towelling, one treated with sulphate of ammonia, one treated with phosphate of ammonia, and one treated with the mixture. In each instance it was noticed where he used the sulphate of ammonia and the phosphate of ammonia singly, that it was impracticable to use them by reason of the discolouration resulting from their use. On the other hand, when he used the composition or mixture, which is claimed to be the patent herein, the difficulty was entirely overcome and the fire resisting properties were put into the material without any discolouration.

Professor Gladding gives the result of that experiment, and more particularly he says: "I find that the usefulness of the Schuler patent consists first in the fact that the mixture of these two salts is less acid than the phosphate alone, and further that when exposed to the action of heat, the product is less acid, and consequently the composition is far superior when used for laundry purposes." It would appear that the mixture of the two salts is a softer mixture when applied to wood. The wood is more easily treated.

A number of authorities have been cited on the question of a mechanical mixture being patentable. On the question whether a patent can issue for a mechanical mixture, the case of *Kahill v. Brown*, Federal Cases Nos. 2291, 3 Benning & Arden, p. 580, might be referred to. This involved a patent for a composition, viz: a bronze dressing for leather composed of spirit varnish and aniline fuchsine with or without the addition of aniline blue or bronze powder. In the opinion of the Court in this case, it was said: "Different theories are maintained as to the way ingredients operate when mixed to produce the patented product, but the Court is of opinion that it is immaterial in this investigation whether the result is produced by mechanical or chemical action, it being shown through a demonstration that the change of colour is produced by mixing the ingredients and that the mixture, instead of stiffening the leather and causing it to crack, renders it more elastic and pliable." This case is cited as an authority on the contention that it is immaterial for the purposes of this investigation of the

merits of this particular patent as to whether the beneficial results which are claimed from the use of the patented composition are produced by mechanical or chemical action.

Reference might be made also to the case of the Atlantic Giant Powder Company v. Goodyear, Federal Cases, No. 623, 3 Benning & Arden, p. 161; also to the case of Ryan v. Goodwin, Federal Cases, No. 12186. The patent in suit here was for a friction match made of a composition of phosphorus, chlorate of potash, sulphat of antimony, and gum arabic or glue, and again the patent was maintained. See also Jenkins v. Walker, Federal Cases, No. 726; also the Alabastine Company v. Payne, 27 Federal Reports, p. 559.

Professor Chandler, in his evidence, stated that numerous patents in the United States and Great Britain—in fact, patents almost without number, have been maintained under a claim for a mere mechanical mixture, and Professor Gladding stated distinctly that there was a chemical change and a different result produced by the combination or mixture of the two substances from that which is produced by the use of either of them singly. It appears to me that whatever improved results flow from the use of the Lina Schuler composition, no matter whether it be a chemical mixture or a mechanical compound, it comes within the rule expressed by Lord Cairns in the case of Harrison and the Anderson Foundry Company: "It is sufficient for the validity of the patent if the composition being the result of thought or experience is new and produces some new result or an old result in a more useful and beneficial way." This doctrine was cited with approval in the case of the Patent Exploitation, Limited v. Siemens Brothers, Limited—a House of Lords case—cited in 21 R. P. C., p. 541.

In connection with the point that was urged, that the publication of the Gay Lussac article, which is filed, was an anticipation, Nicholas on Patent Law, ed. 1904, p. 11, might be cited as to prior publication: "The prior publication will not invalidate a patent unless it has imparted such information as will enable any one working upon it to reckon with confidence on the result. This principle was laid down by Lord Chelmsford, who said: "That the putting of a man on the road to a place is not the same thing as taking him there."

This applies with particular force against the argument that Gay Lussac had suggested the fire resisting properties

of these two salts, but he had never suggested the use of them in combination or the practical advantages that would result from their combination or mixture. I think it is demonstrated that no person who has experimented with the uses of these two salts has ever discovered the advantages which result from the use of this particular compound of sulphate of ammonia and phosphate of ammonia, and, therefore, it remained for this patentee to be the first to discover the useful properties of the composition, and that it would do the work where others failed. As has been well said, it may appear very simple when it is known. Most inventions do appear to be very simple when they are known, as was expressed in another case: "When the thing is once hit, it seems a marvel that it was not hit before." Mere simplicity will not prevent there being invention.

In this case it has been proved that the invention was a commercial success in the United States. This is important, and has a bearing on the determination of the present case. In the Digest of English Patent Cases, p. 154, it is stated: "If within a short time of the first manufacture and sale, an article of commerce commands a ready and extensive sale, that fact which is proof of utility must also be accepted as evidence, not conclusive, but cogent of novelty." In the case of *Savage v. Harris*, English Patent Cases, vol. 13, p. 94, it is said: "The fact that seventeen alleged anticipations were put in by defendant, none of which were shown to be used, held to be evidence tending to support the subject matter of plaintiff's invention, which had a large sale." This authority applies to both the patents in question, and is an authority against the alleged anticipations which have been put in.

I have noticed a marked difference between the class of testimony offered by the Canadian company when attacking these patents from the evidence offered by the American company in maintaining them. It will be noticed by reading the evidence of Professor Ruttan that it merely amounts to this: that he states that these salts of ammonia were known to possess fire resisting qualities; he also states that he never experimented with them in combination; he is not able to find that anybody had ever experimented with them in combination. Professor Stillman was asked a question if a mixture of phosphate of ammonia and sulphate of ammonia in solidified form was not a mechanical mixture, and he answered yes. This appears to be the extent of the

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evidence of the Canadian company against the composition patent, if we exclude Mr. Warfield's evidence.

Against that evidence there is the evidence of Professor Gladding, who made careful experiments in Court with towels, and with blotting paper, and who experimented by subjecting these salts to the action of heat, to find at what temperature they would volatilize and fuse. The results of his experiments are clearly set forth in his deposition. Professor Chandler also pointed out the advantages which result from the use of this mixture, and they are corroborated by the evidence of Mr. Hersey. In my opinion, the weight of evidence is largely in favour of this composition patent.

We now come to the process patent of Bachert and O'Neil. It would appear that this process consists of a series of steps. Let us take claim 3 for example as mentioned in said patent. It consists in enveloping wood in a closed receptacle in an atmosphere saturated with aqueous vapour maintained at about from 110 to 200 degrees Fahrenheit, producing a vacuum and removing the vapour, impregnating the wood uniformly with the fireproofing solution, and finally drying the wood at a low temperature of from 85 to 120 degrees Fahrenheit. It is contended by the Canadian company that the patentees have only adopted well known expedients or well known principles in this process, but it would appear that the useful and one of the novel ideas of the process is the maintaining of a low, moist temperature in the receptacle containing the wood. The Canadian company contends that it was well known that steam at too high a temperature would discolour the wood, because nearly all of the patents alleged as anticipations against this patent relate to the application of steam at high temperature directly to the wood. This principle may have been known, but it was to overcome the difficulty, that the inventive genius of Bachert and O'Neil stepped in, and, while they may have recognized that it was a disadvantage to have the wood subjected to the high temperature, they first thought of passing steam up through the water. They so constructed their receptacle containing the timber, that they had these little jets for passing steam up through the water, maintaining this aqueous vapour at a low temperature, but this was merely one of the steps in the process. In that one essential and novel feature they appear to have overcome what was a serious disadvantage in the application of the other process under the other patents, and by this

exercise of their inventive faculties they pointed out a way in which live steam was prevented from coming directly into contact with the wood. This, however, was only one of the many steps in the process, and the process indicated in the claim of this patent must be considered as a whole, and we must look to see whether all these successive steps were ever practised or published by the other inventions. In examining the patents in the light of such principles, I find there is no anticipation of the essential features of this process in any of the other patents which are urged against this patent.

On this point reference might be made to the case of *Young and Beilby v. the Hermand Oil Company*, vol. 9, R. P. C., p. 373. This was a House of Lords case involving a question of temperatures. It was a question of distilling shale for the production of oil, and this was accomplished by distilling out the oils from the shale at a low temperature in one retort, and thereafter transferring the residue into a second retort heated to a considerably higher temperature, and the advantages of this change of temperature were pointed out, and a better result was attained by the use of the different temperatures described in the patent. A better result was attained than would have been got from the use of a comparatively low temperature, if it had been used alone. This case is cited as shewing that the question of temperatures was treated as a novel feature and as a patentable invention. The same principle was laid down in the case of *Hannington v. Nuttal*, cited from *Frost*, p. 63. Reference might also be made to the case of *Goddard v. Lyon*, R. P. C., vol. 11, p. 360. This is a case exactly in point where the question of changing temperatures was held to be patentable.

The plaintiffs contend that what they claimed by the *Bachert & O'Neil* process patent was not a law of nature, that it was not a law of chemistry, but it was a particular method, means or process of applying certain principles to the preparation of wood for fireproofing, and the application of the fireproofing solution to such wood, and that the process was clearly novel. In the case of *Moseley and the Victoria Rubber Company*, cited in vol. 4, R. P. C., it was held that the invention consisted in the production of a new and useful article of commerce by a new combination of old processes, and it was, therefore, the subject of a patent.

In view of the particular nature of this process which is claimed, we have to look at each successive step. The wood could not be enveloped and saturated at this low temperature unless it were closed in a receptacle, nor could it be impregnated with the solution. The satisfactory and successful operation of the different steps of the process is dependent one upon the other, and the one completes the other in logical and proper sequence, and it is difficult to conceive of a better illustration of a series of steps all co-operating to produce a single result than in the process under consideration. In this particular case it would appear from the evidence that the patentees, Bachert and O'Neil, were the first to invent or to suggest the treatment of wood for fireproofing purposes. All of the anticipatory matters which are urged against this patent relate to the preserving of wood from decay, and, as has been pointed out by the witnesses, the treatment of the wood before receiving the preservative fluid which was to be used for railroad ties or telegraph poles, or for materials to be used on rough outside work, was not of so much importance as when we come to apply it to the treatment of wood for interior decorations, and the finishing of buildings and the making of furniture, when it was necessary to retain the original colour, tensile strength and elasticity and form of the finer grains of wood which were used for this purpose. The only evidence which the Canadian company has adduced against the validity of this patent is the evidence of Professor Durley. None of the other witnesses, neither Professor Ruttan or Professor Stillman, were examined with reference to this point, and Mr. Warfield, who professed to give the benefit of his knowledge in the matter of interpreting patents, was forced to admit that he was not at all versed in the question of temperatures, and even Professor Durley stated that there was only the Buraten binder patent which was similar to the one in question, as may be seen by reference to his evidence at pages 8 to 12. But it would appear that the whole of these patents will be found to have proceeded, as Professor Chandler says, upon the idea of subjecting the wood to a high temperature, and it remained for Bachert and O'Neil to disclose to the public that that difficulty could be overcome by passing the steam through the water and having a moist aqueous vapour at low temperature. The effect of submitting the finer grades of wood to this excessive temperature, which was claimed and mentioned in the patents set up by the Can-

adian company, was made the subject of tests by Professor Gladding and Mr. Hersey. Professor Gladding exhibited in Court samples of the different woods treated by him at the different temperatures, and these samples have been produced before the Court and filed as exhibits, and they were striking ocular evidence of the serious deterioration which these different woods undergo when subjected to such high temperature, and it would appear that the novel and essential features of the patent in question were in no way anticipated by any of the patents which are urged against it. It might be added that many, if not all of them, appear to be mere paper anticipations. Professor Chandler and Professor Gladding both agreeing in saying that in so far as they are aware—and that they have a very broad knowledge of the subject, and Professor Chandler tells us he has been on the outlook for inventions on this subject for a great number of years, and that so far as they are aware, none of these other processes have ever been used for fireproofing wood, and in fact scarcely any of them have been used for preserving wood.

Reference might be made to the House of Lords case of *Acetylene Illuminating Company v. United Alkali Company*, reported in volume 22, *Patent Cases*, p. 154, where Lord Davey is reported to have said: "Unless there be some novelty or invention in the adaptation of the old process to the new use, or the overcoming of some difficulty which lay in the way of such application, you cannot have a patent."

In the present case, Bachert and O'Neil overcame the difficulty of the deterioration of the wood by submitting it direct to the action of live steam, and of high temperature, by passing the steam into these jets up through the water.

In my opinion, the burden of proof was on the defendants to upset the patents. There is a *prima facie* presumption of novelty and utility by the fact of the issue of the patent, and by the profitable use and acceptance of the composition and process by the public as useful, and that this patentable novelty and utility can only be overcome by clear, positive and preponderating evidence against novelty and utility, which I find nowhere in the present case. The defendants did not even allege usage by others, nor did they allege infringement, and they appear to have had everything they bargained for. They had exclusive and undisturbed rights of practising the invention covered by the letters patent.

It must be remembered that the company defendants acquired these patents years ago, and it would appear that the question of their invalidity were never raised until they were pressed for payment of the consideration money agreed on. The evidence shews that the American company has been a success, and if the Canadian company had failed, for reasons that have not been conclusively shewn in the present case, that is no reason why the patent should be declared invalid. As I said before, I require the clearest possible proof of the invalidity of the patent before I would order the cancelling of the bonds, and of the deed of hypothec under which they are secured.

Consequently, I am of opinion that in case number 3079, judgment should go in favour of the plaintiffs for the sum of \$4,217.67, the balance of overdue interest proved to be due by defendants to plaintiffs, and that the defendants' cross demand in said suit should be dismissed, and plaintiffs' action in suit number 1832 should also be dismissed, with costs.

QUEBEC.

DAVIDSON, J.

JANUARY 29TH, 1907.

PECK v. OGILVIE.

Statutes—Motor Car Regulation Act—Inconsistent Municipal By-laws.

DAVIDSON, J.:—This action is before me on a demurrer by defendant, who seeks to have certain words stricken out of the declaration. The claim is for damages (\$453.50), which are alleged to have resulted from a collision between two motor cars. The declaration describes the occurrence in these words:—"On Friday, the 26th of October last, at Dorval, in the district of Montreal, the said plaintiff was coming out of the private residence or grounds of one of his friends in an automobile or motor car, and when he had just reached the main road and was turning eastward towards the city of Montreal, an automobile or motor car, owned by the defendant, came into violent collision with the car in which the plaintiff was and of which the plaintiff at the time had charge."

It is further set forth that the plaintiff's car was moving at a very slow rate of speed, while that of the defendant was being driven at an immoderate rate, "far in excess of that permitted by the by-laws of the locality and by the general statutes of the province of Quebec."

By demurrer the defendant would have the words "by the by-laws of the locality and" struck out, on the ground that violation of any local by-law, as a ground of negligence, cannot be charged, because the provincial statute, 6 Edw. VII., cap. 13, sec. 26, "has taken away the right of the municipality of Dorval to enact by-laws regulating the speed of automobiles."

So far as I am aware, this is the first time a like question has arisen under the motor car Act of last session. Many of the suburban municipalities have by-laws which seek to regulate the speed of motor cars within their limits. I shall, as a consequence, state with greater fulness than is usually necessary on a point of pleading my reasons for the decision at which I have arrived.

The provisions of the Act as to speed are as follows:

"24.—Sub-section 3.—The rate or speed of such motor vehicle in towns and in municipalities governed by the municipal code, between dusk and daylight, shall not exceed six miles per hour.

"27.—A motor vehicle shall not be driven at a speed greater than six miles an hour within the limits of a city, town, or village, nor at a speed greater than fifteen miles an hour in any other locality.

"28.—When approaching a sharp angle, bridge or steep descent in the highway, or intersecting highways and crossings, the speed of the motor vehicle shall be reduced to four miles per hour and a signal shall be blown upon approaching an angle in a highway".

The inhibiting enactments of the statute as to by-laws are as follows:

"26.—No ordinance, by-law or regulation now in force in any city, town or other municipality which regulates the speed at which automobiles or motor cycles shall be run upon its public highways shall hereafter have any force or effect. Nothing herein contained shall, however, be so construed as to affect the rights of boards of park commissioners, as authorized by law; and such boards and the local authorities may, notwithstanding the provisions of this Act, make, enforce and maintain such reasonable by-laws, rules

and regulations concerning the speed at which motor vehicles may be operated in any parks or parkways within a city, but, in that event, must, by signs at the entrance of such park and along such parkway, conspicuously indicate the rate of speed permitted or required, and may even exclude motor vehicles from any park, parkway and cemetery or grounds used for the burial of the dead.

“31.—Subject to the provisions of this Act, municipal corporations or councils shall have no power to pass, enforce or maintain any by-law or resolution requiring of any owner or operator of a motor vehicle any license or permit to use the public highways, or excluding or prohibiting any motor vehicle, whose owner has complied with this Act, from the free use of such highways, except such driveway, speedway or road as has been or may be expressly set apart by law for the exclusive use of horses and light carriages, or except as herein provided, in any way affecting the registration or numbering of motor vehicles or prescribing a lower rate of speed than herein specified at which such vehicles may be operated, or the use of the public highways, contrary to or inconsistent with the provisions of this Act; and all such by-laws, rules or regulations now in force are hereby declared to be of no validity or effect.”

There are decisions which support the principle that regulations enacted or provided for by statute, like those, for example, of the Pharmacy Act, the Railway Act, and the Provincial Factory Act, do not affect certain rights as to damages given by the Civil Code. *Singer v. Leonard* (Review, 1889), 34 L. C. J. 20; *Carcoran v. Montreal Rolling Mills* (1896), 24 Can. S. C. R., 595; *Legare v. Esplin* (Review, 1897), 12 S. C. 113; *Lee v. Burland* (1896), 9 S. C. 294; *Hence v. Standard Chemical Co.* (1906), 7 P. R. 451. The Factory Act expressly declares (R. S. Q., 3053) that the responsibility of the employer toward his employees is in no manner modified or changed by its provisions.

The Motor Car Act is broader, for it declares that (sec. 30): “Nothing in this Act shall be construed to curtail or abridge the right of any person to prosecute a civil action for damages by reason of injuries to person or property resulting from the negligent use of the highways by a motor vehicle or its owner or his employee or agent.”

This section and the decisions quoted might, or might not, make invocation of a local by-law irrelevant. In some cases, relevancy is possible of support by serious argument. But

the plaintiff stands on legal ground of much greater strength and certainty. The Motor Car Act nullifies then existing and for the future prohibits by-laws which would locally regulate the speed of motor cars on ordinary highways.

Suppose a municipality by by-law or other regulation permitted motor cars to run within its limits up to a rate of only two miles an hour, or, on the other hand, up to twenty miles an hour, could it be invoked in the one case by a plaintiff as magnifying the negligence, or in the other case by a defendant as justifying his speed? Clearly not. For the by-law or regulation is in itself an infraction of the prohibition of a statute, which in this and some other respects speaks with express and total exclusion of municipal authority.

The demurrer is maintained and the words "by the by-laws of the locality and" are struck out of the declaration, with costs.

NEW BRUNSWICK.

FULL COURT.

JANUARY 30TH, 1907.

THE KING v. McCARTHY.

Revenue—Customs Act—Fines for Smuggling—Payment to the Receiver-General.

Motion made under C. S. 1903, c. 65, s. 6, by E. H. McAlpine, K.C., for a rule requiring the police magistrate of the city of St. John to pay to the Receiver-General of Canada the sum of \$160, two fines of \$50 each imposed on the defendant for harbouring smuggled goods contrary to s. 197 of the Customs Act, R. S. C., 1886, c. 32.

C. N. Skinner, K.C., contra, contended that under 52 V. c. 27, s. 50 (Acts of Assembly, 1889), the police magistrate of the city of St. John must pay all fines and penalties imposed by him to the Chamberlain of the city, to be placed to the credit of the police fund in the treasury department of the city, leaving possibly the treasury department liable to account to other persons.

TUCK, C. J.:—I have no doubt about this case. It is clear that The Customs Act makes these penalties payable to the Receiver-General of Canada, as part of the consolidated revenue. The local legislature would have no power to do so if they professed to deal with it. It is a matter exclusively within the cognizance of the Parliament of Canada. The Act, 52 V. c. 27, only has reference to fines and penalties imposed for a breach of municipal or police regulations, or such as are by law made part of the revenue of the city for general or special purposes.

HANINGTON, J.:—I agree. The matter is exclusively within the jurisdiction of the Dominion Parliament. The local legislature could not deal with it even if they assumed to do so; and they do not.

LANDRY, BARKER, MCLEOD, and GREGORY, JJ., concurred.

QUEBEC.

SAINT-PIERRE, J.

JANUARY 30TH, 1907.

DARWENT v. MONTBRIANT.

*Landlord and Tenant—Barber Shop—Tenant Vacating,
Shop—Special Damage.*

SAINT-PIERRE, J.:—This action, which is one between lessor and lessee, has given occasion to the discussion of an interesting point of law. The facts are the following: The plaintiffs are the owners of a store at No. 598 Wellington street, in the city of Montreal, which, they say, was rented and used for a period of twenty-five years as a barber shop.

On the 3rd of February, 1904, said shop was rented to Edouard Montbriant, who is a barber by trade, for a period of three years from the 1st of May, 1904, to the 1st May, 1907, to be used by him as a barber shop. The rent agreed upon was to be two hundred and four dollars a year, payable in equal payments of seventeen dollars per month.

Along with the barber shop the premises leased included the flat above, which was used as dwelling apartments.

The lease contained a clause prohibiting the lessee to make over his interest in the lease and to sublet the whole or any part of the premises leased without the consent of the lessor.

At the time of the passing of the lease the flat above was occupied by a tailor, who was allowed to remain undisturbed by the defendant, Montbriant, on his paying to him six or seven dollars' rent per month.

The barber shop had been previously occupied by one Shafter, who was a barber, and Montbriant tells us that he bought out from him his chairs, fixtures and everything, including the clientele and the good-will of the business.

Having found out that a pool-room two doors further down was to be rented and that it could be utilized by dividing it into two compartments, both as a pool room and a barber shop, Montbriant thought that he might improve his condition by abandoning the premises leased by him from the plaintiffs, and transporting his business into the pool room. He did so on the 27th of March, 1906, taking away with him his chairs and all his belongings. This moving away by Montbriant was followed on the part of the plaintiffs by the present action, accompanied with a writ of "saisie-gagerie par droit de suite" in the hands of Edward May, the proprietor of the house wherein Montbriant had taken his barber chairs and movable effects. This action bears date the 5th day of April, 1906. In their conclusion the plaintiffs claim for rent and damages the sum of \$400, said sum being made up of the following items: 1st, the rent for the month of March, \$17; 2nd, \$85 for five months' rent, including the month of April, claimed by way of damages to wit, April, May, June, July, and August, owing to the impossibility to rent the shop in question to a barber before September; 3rd, \$289 for the loss of rental during the remaining term of the aforesaid lease; in all \$400. On the 17th of April the defendant filed a confession of judgment for the sum of \$34, said sum representing two months' rent, without, however, any reference being made in any way to the costs of this present suit, which was then pending. This the plaintiffs declined to accept. In his plea the defendant denies most of the allegations contained in the declaration, and sets forth the following facts: He alleges (1) that on the 6th day of April he offered to the plaintiffs

their rent for the month of March, but that his offer was refused; (2), that during the week which preceded his moving away, he offered to the plaintiffs, as a suitable lessee, Dr. Wilson and his mother, Dame H. Robert Wilson, but that again his offer was declined; (3), that about one week after his departure he offered two other substitutes, Mr. and Mrs. George Melay, who were desirous of opening a jewellery store in plaintiff's premises, and that he was met with the same refusal as on the two former occasions; (4), that later on, two barbers, one of the name of Alfred Harvey, and the other of the name of Alphonse Robitail, went to the plaintiffs and expressed their willingness to rent the store in question as a barber shop, and that their offer was also declined; the defendant admits being indebted to the plaintiffs for the two months of March and April (\$34), but alleges that having filed a confession of judgment for the above sum of money his liability does not extend further, and that the surplus of plaintiffs' demand should be disallowed and dismissed with costs.

The writ of *saisie-gagerie* was issued on 5th day of April, and the offer alleged to have been made by the defendant having been made on the sixth, the costs incurred up to that date should have been added to the amount offered. Besides no actual tender of money was proven to have been made either on that day or at any previous time.

It is clear, therefore, that the writ of "*saisie-gagerie par droit de suite*" was taken out on good ground, at least so far as it referred to the month of March. Furthermore, the defendant having vacated the leased premises, as explained above, it is equally manifest that the plaintiffs were well founded in their demand for a rescission of the lease, and for a certain quantum of damages; but what that quantum should be is the difficult point in this case.

The defendant admits that he vacated the leased premises on the 27th day of March, and the proof shews that on the 5th day of April, 1906, when the writ of *saisie-gagerie* was taken out, he actually owed one month's rent. The written lease filed in the record shews that the contract of lease was to terminate on the 1st day of May, 1907, which left thirteen months to run at the date of defendant's departure. The plaintiffs have produced witnesses to prove that, owing to the special destination of the store in question, as a barber shop, it will not be possible for them to obtain a barber as a tenant before the month of September.

They, therefore, claim by way of damages, a sum of money equivalent to the accumulated rental of the months of April, May, June, July and August. They further pretend that the defendant, by closing the barber shop, has thereby changed its destination and deprived them of their clientele, which is now led to go to the barber shop opened by the defendant, two doors further down. Under this head, they claim damages to the amount of \$298.

There exists no prohibition in the lease by which Montbriant, the defendant, might be precluded from opening a barber shop in the neighbourhood of the shop he had leased from the plaintiffs. He might have opened as many of those shops as he chose; but, he was all the while bound to keep up his contract of lease. He could not close up the shop he had originally leased as a barber shop. On the other hand, the plaintiffs were in no way obliged to put an end to lease, and to accept a substitute in the place of the defendant, even if a solvent and suitable barber was offered, more particularly when they were aware of the fact that the object, which the defendant had in view, was the creation of a rival establishment in close proximity to their own shop. They are, therefore, entitled to damages as a result of the losses they are likely to incur in consequence of the violation of the conditions of the lease by the defendant. In ordinary cases an indemnity equal to three months' rent is considered sufficient. Here, however, I am told, and the evidence adduced in the case appears to justify the assertion, that it would be impossible for the plaintiffs to find a suitable tenant as a barber before the month of September following the date of the breach of the contract. This means that at that latter date, the barber shop is expected to be restored to its original destination, and that the shop shall be in a condition to receive its old "clientele" as before. The plaintiffs, however, are not satisfied with that part of his conclusions, and claim that the fact of having left the shop closed had, for its result, the loss of the "achalandage," which existed formerly, which loss they say must be assessed at the sum of \$298. All the text writers who have written on this subject agree that the lessor, in a case such as the present one, is entitled to damages, but the amount demanded in this case appears to be manifestly exaggerated. The "clientele" of a barber is not so much the "achalandage" of the place where he is carrying on business as that of the barber himself, and, more-

over, it is by no means certain that the plaintiffs may not be able within the extended delay they have asked for, to find a suitable tenant who will be willing to pay them as high a rental as that which they originally received from the defendant.

I will, therefore, maintain the present "saisie-gagerie par droit de suite," which was taken in the hands of Edward May, the mis-en-cause, resiliate the lease, and condemn the defendant to pay to the plaintiffs the sum of one hundred and twenty-seven dollars, said sum made up as follows: (1) \$17 for the rent of the month of March, 1906, \$85 by way of indemnity, or damages, representing the rent of the months of April, May, June, July and August, and twenty-five dollars as representing the damages suffered by the diminution in the "achalandage" of the barber shop, the whole with interest from this date and the costs.

QUEBEC.

DUNLOP, J.

JANUARY 30TH, 1907.

HENCE v. STANDARD CHEMICAL COMPANY.

Negligence—Railway Siding—Owner of Land Leaving Obstruction near Siding—Servant of Railway Injured in Removing it—Damages.

DUNLOP, J.:—Plaintiff alleges that on the 9th January, 1906, at about 11 o'clock at night, he was in the employ of the Grand Trunk Railway, and he was in the company of some other employees of the same company on a freight engine, which drove on to the lands of the company defendant to take away certain empty freight cars, which had been transported there to ballast a siding constructed on the lands, and in the possession of said company defendant. The company defendant had requested the railway to send for said freight cars. Defendants had left, close to the siding at a less distance than five feet from it, a large quantity of planks and beams which had been used as scaffolding for the works of the company defendant, the property of the defendant Deakin. The timber was piled carelessly and had been placed there by both defendants, in such a careless

way as to cause it to project over the railway track on the said siding. Some of the planks fell as the engine was backing down, and the further progress of the engine was blocked. Plaintiff with others was assisting in clearing the track, when further planks fell upon plaintiff and inflicted injuries so serious that he will suffer from the effects for the remainder of his life. Damages in the sum of \$10,240 are claimed. The company defendant were the owners of the building, constructed by defendant Deakin, and for which the planks and scaffolding in question had been used. A joint and several condemnation is prayed for. The defendant Deakin pleaded that, at the time of the accident, the said siding was still in course of construction and he had no right of ownership or of control over it. That he took no part in the construction of said sidings nor did he supply any of the component materials thereof. The company defendant pleaded, denying generally, the allegations of the declaration, and, specially, pleaded that the allegation that certain wood had been piled too close to the track, in violation of the dispositions of the Canada Railway Act of 1903, is illegal. That it was not in possession of said siding, which was still in course of construction, nor did it own any of the component parts thereof. It was the duty of defendants to keep said siding clear. It is proved they did not do so. It is established that a large pile of lumber was within five feet of said siding, and caused a menace to persons having business on said siding, which was being constructed by the Grand Trunk Railway. The plaintiff at the time of the accident was employed in his ordinary vocation, and coupled the said freight cars in order to facilitate their removal. The company defendant, as proprietors of the said property where the siding was, and where the accident occurred, and the said other defendant, contractor for the building of certain works on said property of the company defendant, then in course of construction, were guilty of negligence, imprudence and want of care in placing and allowing said planks close to said railway, more especially as there was a condition in the contract or agreement between the company defendant and the Grand Trunk Railway, of date the 6th December, 1905, whereby the said company defendant bound and obliged itself to keep a distance of 6 feet from each side of said siding free and clear from all obstructions, and bound itself further to remove any obstructions which might be made within such

limit, and which condition was not observed or carried out in the present instance; and the said condition is the ordinary and usual condition inserted in siding contracts, and is well known to all contractors, manufacturers and others operating and using such sidings, and is a condition in the interest of the safety of all such parties. The accident was the result of imprudence, negligence and want of care of defendants. The plaintiff is but 22 years of age, he has lost the use of his left leg by reason of said accident, he was earning \$80 per month as a coupler, and was in line for immediate promotion. I assess the damages at \$3,240, with interest and costs, to all of which I condemn the defendants jointly and severally.

QUEBEC.

CURRAN, J.

JANUARY 31ST, 1907.

TAPLEY v. MARKS.

Statutes—Retroactive Effect—Interest—Money Lenders Act.

CURRAN, J.:—Plaintiff sues upon a promissory note, and claims \$150, and for interest at 60 per cent., as called for the note, dated 14th August, 1903. The whole claim amounting to \$162.50. Defendant pleads that, on the date of the note, he borrowed from plaintiff \$150. Since the maturity of the note he has paid plaintiff the sum of \$250, that plaintiff is a money lender, as defined in the Act 6 Edw. VII., chap. 32, sec. 2, and was such money lender at the date of the note. That the loan was usurious and illegal, and that plaintiff, under said statute, cannot claim more than the amount of the note and interest at 12 per cent. per annum. That at said rate of interest, defendant has more than paid the amount of the note, and such legal interest. Further, that plaintiff cannot recover costs, as he has brought suit in his own name, and that he is not a member of the Bar. Defendant's plea is virtually a contention that the Act 6 Edw. VII. ch. 32, is retrospective in its application. Nothing in that statute can be so construed, because there is no declaration to that effect.

Lord O'Hagan, in the case of Gairdner v. Lucas, 3 App. Cas. 601, said: "Unless there is some declared intention of

the legislature clear and unequivocal—or unless there are some circumstances rendering it inevitable that we should take the other view, we are to presume that an Act is prospective and not retrospective.” Bowen, L.J., in *Reid v. Reid*, 31 Ch. D. 408, said: “Except in special cases, the new law ought to be construed so as to interfere as little as possible with vested rights.” In *Midland Railway v. Ipswich*, 2 Q. B. D. 269, Cockburn, C.J., held: “It is a general rule that where a statute is passed, altering the law, unless the language is expressly to the contrary, it is to be taken as intended to apply to a state of facts coming into existence after the Act.”

Under these circumstances, plaintiff must have judgment for the amount claimed and for disbursements.

QUEBEC.

LAFONTAINE, J.

FEBRUARY 8TH, 1907.

ALLAN v. ROBERT.

Bills of Exchange — Consideration — Illegality — Loan for Gambling Transactions.

LAFONTAINE, J.:—Plaintiff claims from defendant the sum of \$5,000, amount of a promissory note, dated the 6th March, 1905, by which defendant promised to pay on demand to W. H. Walsh the sum of \$5,000, for value received, which note is endorsed in blank by said Walsh, and is filed by the plaintiff in the present suit. Defendant pleads, substantially, that the said note was given to the said Walsh without any consideration or for any value received, and that the plaintiff is not a regular holder of said note, that he has given no consideration to said Walsh for the said note, that he is simply a prete nom for Walsh, and that the said note was given to said Walsh as a guarantee of the integrity of defendant while manager of a partnership entered into the same day with Walsh and as payment, by anticipation, of the profits to be made by said partnership; that towards the formation of said partnership, which was to be a brokerage business, the defendant was to contribute his experience, and said Walsh was to contribute \$1,000, paid the

same day to defendant, who gave, in acknowledgment of the receipt of the said sum, to said Walsh, a note for \$1,000, still in Walsh's possession; that the sum of \$1,000 received by defendant has been expended for the affairs of said partnership, such as rent and other similar charges; that the said partnership was not successful; that the business was closed up after a few months, and defendant rendered an account to plaintiff, which plaintiff accepted. Although it is admitted, both by plaintiff and by Walsh, that plaintiff is simply Walsh's prete nom, and that plaintiff admits, in his own deposition, that he is not a creditor of defendant that he has no interest in the matter; that the note on which the present action is founded has never been in his possession, and that he never saw it until the day upon which he was examined as a witness herein, it is none the less true that he is a creditor, although he says he is not, by the intermediary of his lawyer, and he became the holder by the endorsement of said note in blank by said Walsh, who was the owner thereof, and even though he (the plaintiff) has not had the material possession of said note, he is, at least, the legal and virtual owner thereof, inasmuch as he has permitted his lawyer, who is also Walsh's lawyer, to take the present action in his name, and that he persists in his action, and that for the purposes of the present suit he is the owner and holder of the said note by the permission of said Walsh, and that the defendant, by paying the amount of the said note, would obtain its return to him and a valid discharge therefrom. Therefore, this first means of defence is dismissed. Although the defendant swears that a partnership was effected between him and the said Walsh, and that the said note was simply given in payment of anticipated profits to be earned by the said partnership, which profits have not been realized, while supposing that any such proof would be legal, it is positively denied by Walsh, who swears that there was never any question about forming a partnership between himself and defendant, that no such partnership was ever formed between them, and that the said advance of \$1,000 was purely and simply a loan to defendant, and the said loan was the consideration of the note for \$5,000. This version of the matter is confirmed by defendant's own testimony, inasmuch as he swears that in acknowledgment of the receipt of the sum of \$1,000 he gave Walsh his note for \$1,000 (which Walsh denies, and swears that there is only one note, and it is the note for \$5,000), and that it is dif-

difficult to understand how, if the sum of \$1,000 was the share contributed by said Walsh to the capital of said partnership, why the defendant should have given a note in place of a receipt, and it is also confirmed by the admission of the defendant in his letter of March 6, 1905, as follows: "In consideration of your cashing my note of \$5,000 of this date, March 6," so that the handing over of the \$1,000 was a loan with interest, with, in addition, a profit or bonus under guise of a share in the earnings of the operations which defendant meditated to put into effect by means of said sum of money, which earnings were reasonable enough, if we keep in view the risk the lender incurred in lending money for a business proposition without any warranty, so that there is no evidence before the court to justify the pretension of defendant that a partnership existed between Walsh and defendant; but that there was simply a contract of loan between the said parties, with a stipulation that the lender should receive a definite share of the profits to result from the business of the partnership, in addition to the interest of 20 per cent. mentioned in said note. However, it is admitted by Walsh, the real plaintiff in the case, that the brokerage business, which defendant intended to carry on, was of the kind known as "bucket shops," as Walsh says himself; that the defendant wished to instal a private wire to buy and sell stocks dealt in by "bucket shops," as defendant says; that the intention of the parties was to carry on a bucket shop business; that the plaintiff admits knowing what is meant by a "bucket shop," although he swears afterwards to not exactly know what the expression means. It is clear that, although there was no such partnership between Walsh and Robert as the latter would pretend, still Walsh was involved and interested in the operations about to be started by Robert by means of the money Walsh had loaned to him; that Walsh was to have half the profits from the business, in addition to 20 per cent. on the note for \$5,000, although he only subscribed the sum of \$1,000, and that the sum of \$4,000, which is the difference between the amount loaned and the amount of said note now sued upon, was in consideration, as defendant Robert says, of the share of the profits which was agreed upon between them, in accordance with the terms of the letter sent by defendant to plaintiff on the same day as the money was handed over to him, and in conformity with the terms of the agreement entered into between them. Robert made weekly reports

to Walsh of the operations he was making. The operations of the nature of those carried on in the offices known in the popular language of the day as "bucket shops," are forbidden by law, and those who take part in any such operations are punishable, under the provisions of the Criminal Code, not only by fine, but are further liable to imprisonment, and the place of business of any such illegal operators, commonly and generally known as "bucket shops," are gambling houses within the meaning of the definition of such term, and the persons who keep any such place of business are reputed to keep a gambling house (art. 201, Criminal Code), and Walsh, in advancing the said money to enable Robert to open and keep open any such place of business, in consideration of receiving a share of the profits to be earned in such business, became thereby the accessory of defendant (section 10). Consequently, the cause or consideration of said note is illegal and unlawful and the nature of the business which it was intended to carry on by means of said money constituted a criminal offence, and when one alleges his own wrongdoing, he cannot call upon the Courts to come to his relief; that, at the most, the present case rests upon a gaming debt, for the recovery of which no right of action is given. (*DalGLISH v. Bond*, M. L. R., 7 S. C. 400; *Eager v. Lajeunesse*, L. L. K., p. 190; 21 *Baudry Lacantinerie*, No. 127. And although this point has not been raised as a means of defence, the Court itself is obliged to take cognizance of it, seeing that it is a question of good morals and public order, 27 *Laurent*, No. 201; *Ruben de Conder*, jeux de bourse, No. 41; *L'Association St. Jean Baptiste v. Brault*, 30 S. C. R. 598. The action is dismissed, but without costs, in view of the nature of the transaction between the parties and of defendant's neglect to raise this means of defence by his plea.

QUEBEC.

COURT OF KING'S BENCH.

FEBRUARY 22ND, 1907.

HEBERT v. LA BANQUE NATIONALE.

Bills of Exchange—Alteration—Adding Provision for Payment of Interest—Knowledge of Alteration.

CARROLL, J.:—The judgment, now appealed from, was rendered by the Superior Court, Iberville, Paradis, J., on

the 9th April, 1906, maintaining plaintiff's action and condemning present appellant and Samuel J. Roy, jointly and severally, to pay it the sum of \$2,002.53, the amount of a promissory note, with interest at 7 per cent. on \$2,000. The whole case is on this point: The present appellant attacks a promissory note which he signed, together with Samuel J. Roy, in favour of the plaintiff, for the reason that, after his signature had been affixed to the note, and without his knowledge, the note had been materially and essentially changed by having the words "with interest at 7 per cent. per annum" added, alleging that the words had been written in by his co-defendant. The note in question is as follows:—

\$2,000.

St. Johns, P.Q., 11 September, 1903.

On demand, for value received, we jointly and severally promise to pay to our own order, at the office of La Banque Nationale, here, the sum of two thousand dollars, with interest at 7 per cent. per annum.

(Signed) Samuel J. Roy.

J. E. Hebert.

and endorsed: "Pay to the order La Banque Nationale."

J. E. Hebert.

The defendant pleaded the alteration above referred to; that it had been done by the other defendant without his knowledge, and not in his presence; that the note had been discounted by the other defendant, and he alone had received the money, to the knowledge of the plaintiff; that the said alteration or addition materially changed the said note, and defendant was thereby discharged from all liability under it, and he asks that the action be dismissed as to him. His affidavit accompanies this plea. The plaintiff answered that the words attacked were put there to the knowledge and consent and in the presence of the defendant Hebert; that the words were written to overcome an error which had been made in omitting, since it was a note payable on demand, had to carry interest, and consequently adding the said words did not change the note as to its legality, and, furthermore, that since the signing of the said note, after knowing of the addition to it, the defendant has frequently acknowledged his responsibility under it towards the plaintiff. The plaintiff alleges that this acknowledgment and promises to pay on the part of the defendant Hebert prohibit him from setting up his present plea. The plaintiff

admits that the proceeds on the said note were credited only to Samuel J. Roy. In answer to this the defendant Hebert denies his acknowledgment of the debt, and denies having promised to pay the note. The Court below found that the words now complained of had been added after the note was signed by Hebert, but it was of the opinion that they did not materially change the effect of the note or discharge Hebert from it, inasmuch as he should have known that it was usual and customary in transactions of this nature for the banks to charge interest at the rate of 7 per cent. for the accommodation they afford.

The Court below was further of opinion, from the evidence, that the money would not have been loaned on the note until such time as the words complained of were added to it, and it was necessary that they should be added. As the agreement between the two defendants, the agreement, which led to the making and signing of the note, was that they should both share in the profits on the sale of butter then in cold storage, after it was kept there for an advance in the market price, and as they had not the required means to pay for the butter without aid from the bank of the nature given them, it was of the opinion that the act of Roy, in adding the said words, was not a fraud, and was done simply for the purpose of benefiting both the parties—the defendants—to the said note. Judgment was accordingly given against the two defendants, jointly and severally, the defendant Hebert being condemned in addition to the costs of contestation of the action. The appellant attacks the above judgment, by alleging that it is proved that the addition was made without the knowledge or consent of the appellant. Appellant claims that the reasons of the Court below cannot sustain a condemnation against appellant. Appellant further cites articles 63 of the Bills of Exchange Act as another reason for the present appeal. The appellant further pretends that in order to justify the reason given in the Court below, that these words had been inadvertently omitted. It is necessary to shew that it was agreed between the two defendants that the interest should be seven per cent. per annum. Appellant claims there is absolutely no evidence whatever of any such agreement having even been mentioned between the parties at the time the note was signed. On the contrary, appellant pretends that from the evidence of record, it can be presumed that if the interest was to have been at the rate of seven per cent. the appellant

would not have signed the note at all. Appellant further argues that the judgment of the Court below was also in error when it decided that usage governed in the case, and that, therefore, when appellant signed the note in blank, as to the interest charges, that it was an applied authority from him to any one to add the words complained of. Appellant claims that there is no proof in the record such as is required to prove custom or usage. Bills of exchange, so he says, payable on demand, are frequently declared good by our Courts, although no interest is stipulated in them, and is not demanded by the action. Appellant further pretends that even if he did acknowledge the said note and promise to pay it, he could not be legally forced to do so. He could not approve of a forgery and condone it by paying the seven per cent. interest. For all these reasons, appellant claims that the judgment should be reversed. I think that this addition to the note constituted a material alteration. Section 63 of the Bills of Exchange Act—now sec. 146 of the new Revised Statutes—which is applicable to promissory notes unless by reasons of contradiction or incompatible provisions, reads as follows: "Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is voided, except as against a party who has himself made, authorized or assented to the alteration, and subsequent indorsers."

The appellant was not a consenting party to the alteration at the time it was made. But did he acquiesce in it? That is the whole question? Camaraire, the bank's accountant, said that the appellant came to the bank about the 1st of April, 1904; that he asked for the note, and, upon it being shewn to him, he said: "That is my note, I recognize it; I will pay you, but Mr. Roy will pay too. The bank will not lose a cent. I will pay the note." And Mr. Camaraire adds that during the whole time he was making his remarks, Mr. Hebert held the note in his hand. Consequently, he knew of the alteration Roy had made to the note. Dorais, the manager of the bank, said that he met Hebert on the 14th of April, and that the latter told him that "if the bank would be good enough to wait until the month of June, that he would pay us." Hebert gives another version of this meeting, but, and I believe with reason, the Court below accepted the story told by Dorais and Camaraire. Was there acquiescence in the alteration? I have no doubt about it. Hebert knew of the

alteration, and knowing it he promised to pay the note just the same. Eaton and Gilbert, cited by respondent, say: "Where a person, after full knowledge of an alteration, unconditionally promises to pay, it is a sufficient ratification, and if the party liable on the instrument, with knowledge of the alteration, applies for and receives an extension of the time of payment, he will be deemed to have ratified it."

The judgment is unanimously confirmed.

QUEBEC.

COURT OF KING'S BENCH.

FEBRUARY 22ND, 1907.

LAMOTHE v. NORTH AMERICAN LIFE ASSURANCE
COMPANY.

Insurance—Life Insurance—Action to Cancel Policy—Material Misstatements—Refusals by other Companies to Insure—Intemperate Habits—Application Filled in by Agent and Not Read by Applicant.

CARROLL, J.:—The North American Life Insurance Company, respondent herein, in their action against J. C. Lamothe, appellant herein, sued the said Lamothe for the annulment and cancellation of policy No. 43684, issued by the company on the 22nd September, 1904, which was taken out by one Colbert O. Grothe, on his own life. The policy was in possession of the said Lamothe under and by virtue of an assignment made to him by the said Grothe on the 22nd September, 1904. Grothe having died on the 7th February, 1905, the claim for the amount of the insurance was made on the company; but the latter declined to pay and sued Lamothe to have the policy cancelled. Lamothe, the appellant, immediately took action against the company to enforce payment of the policy. Long and protracted pleadings were filed in both cases, and after issues had been joined, their joinder was ordered by judgment of the Superior Court. This judgment was confirmed by Mr. Justice Hall by his judgment refusing leave to appeal to appellant. The case duly proceeded to trial before a mixed jury on the 14th December, 1905, and on the 30th December, the jury returned a verdict in favour of the company respondent

upon certain of the questions submitted. On this verdict Mr. Justice Doherty rendered judgment on the 10th January, 1906, maintaining the company's action against Lamothe, ordering cancellation of policy No. 43684 and dismissing Lamothe's action against the company for the recovery of the amount of the policy. The present appeal is based on the following reasons: That the judgment and verdict are contrary to law, and also evidently against the weight of evidence, and are in favour of appellant; that the facts as fixed after amendment, by Mr. Justice Doherty, were defective; that the Judge of the Court below illegally admitted evidence which had been objected to; that the Judge of the Court below misdirected the jury, both as to the facts and as to the law, refused to direct them on points of fact and law, undertook the functions of the jury, to all of which appellant uselessly objected to at the time; that the Court below should not have given costs against the appellant in both cases; that the verdict rendered is incomplete, does, not pass upon the questions at issue, and is, moreover, contradictory. The appellant argues for judgment in his favour non obstante veredicto or for judgment ordering a new trial.

The verdict of the jury, while declaring that Lamothe, the appellant, had had no knowledge of Grothe's application for insurance, and that the policy had not been taken out for Lamothe's benefit, said, however, that it had been taken out for the benefit of anyone who would wish to take as a speculation, and the verdict further says that in contracting with the company, Grothe had not contracted bona fide for himself. The verdict further declares that the answers to the questions respecting the temperate habits of Grothe, were materially erroneous, as was also the answer which declared that Grothe had not been refused by any other companies, when, as a matter of fact, he had already been refused by four companies. The appellant complains particularly of that part of the charge to the jury respecting the two following questions: (a) Did Grothe contract bona fide for himself; (b) Was Daveluy the agent of the company or the agent of Grothe—respecting which second question appellant pretends the Judge did not leave the question of agency to the jury. In explaining the first question to the jury, the Judge made very exhaustive remarks, but they are contained in the two following paragraphs: "If, in other words, the only purpose he had in taking that contract out, was to

make it possible for some third person to find himself in the position of having a policy on Grothe's life by stepping in and paying the premium—if that is all that Grothe wanted when he went into that transaction, on all he contemplated, or intended to do, then, I think you would be entitled to say that he did not bona fide contract for himself.” And again: “If you see evidence which would lead you to the conclusion that Grothe made this application and proceeded to take this policy out, without intending to carry it out, and never expected to get any benefit from it, but procured it (as I have said) merely as a something that might be had by himself or by someone else, to enable an outsider to be placed in the position of having acquired an insurance on his life, then Grothe was not bona fide contracting for himself, because he neither intended to fulfil the obligation, nor did he look to get any benefit out of the contract itself.” It is true in the Judge's charge, which is very long, that it is possible here and there to find certain isolated expressions which give ground to some extent for appellant's criticism, but the whole meaning of the Judge's remarks is contained in the above paragraphs, which I have just cited, and from the viewpoint of law those paragraphs are above reproach. The law having been exactly laid down on this point, the Judge commented on certain facts. He told the jury that when there was no direct evidence that Grothe had not contracted bona fide for himself, but that, from certain established facts, they might deduct certain conclusions, for example, that it was Daveluy, the agent, who went to see appellant, and that he offered him the insurance policy as a collateral warranty for the payment of the premium; that, up to that time, the policy had not been handed over to Grothe, and that Daveluy offered it to any one who would pay the premium. The Judge further told the jury that Grothe was insolvent, that he had already transferred two policies of insurance obtained to the said Daveluy; that when an application was made for the policy now in question, Grothe did not bother whether the correct answers had been given or not, depending entirely on what Daveluy had said in that respect. And the Judge told them: “In view of all the circumstances, you will have to consider whether Grothe only took the said policy to favour his friend Daveluy, so that the latter could get a commission for himself.” These were questions of fact, given by the Judge to the jury for their appreciation, and

the law having been explained to them in such a way that they could be induced into error, it was their duty to apply the law to the circumstances which surrounded the application for insurance. Had the jury answered: Grothe did not contract bona fide for himself, but for any one who would care to take the policy as a speculation. The appellant complains of the manner in which the Judge modified the question from the form in which it was originally drafted. To the tenth question the jury answered that the policy had not been taken for the benefit of J. C. Lamothe (the appellant). And, to the eighth question, the jury answered that Grothe had not taken the said policy for the benefit, or at the demand or to the knowledge of Lamothe. The appellant complains of the amendment made by the Judge during the trial; the Judge suggested to the jury that they could answer that Grothe had taken the policy for whoever wanted it as a speculation. That, in effect, is what they answered, and that is one of the appellant's grounds of complaint. But article 500 of the C. C. P. says: "A new trial is not granted on the ground of mis-direction, or of the improper admission or rejection of evidence, unless some substantial prejudice has been thereby occasioned; and, if it appears that such prejudice affects a part only of the matter in controversy, the Court may direct a new trial as to such issues only."

But, says appellant, the answer of the jury that I had had nothing to do with the issuing of the insurance policy—this favourable answer is nullified by the amendment to the question whereby the jury were permitted to formulate the answer that the policy was for the benefit of any one who cared to buy it. But I do not see that the appellant suffers any real prejudice by said answer. It is not at all necessary that the original answer should have absolved appellant from any participation whatever in the issuing of the policy. It would have only been necessary to put the following question to the jury: Did Grothe contract bona fide for himself? And upon the negative answer of the jury the legal conclusions would have been the same as if no addition had been made to the question. It clearly appears from the answers given to the questions that the appellant had nothing whatever to do with the issuing of the policy. But this does not change the position of affairs. It is simply sufficient for the purpose of rendering the policy null and void that Grothe did not contract bona fide for himself. Another point on

which the present appeal is based is this: The Judge did not leave the question of agency to the jury. The appellant says that Daveluy was the agent of the company and was not the agent of Grothe, the insured. The Judge told the jurors: "Do not occupy yourselves with the question of agency. I take the responsibility of stating that Daveluy was Grothe's agent." Was this direction to the jury erroneous? For argument's sake, I suppose that Daveluy was the regular agent of the company when he went to see Grothe to obtain the insurance. Daveluy swears (and this is appellant's pretension) that Grothe did not read the answers contained in the application,—which Grothe signed. The appellant says: "Daveluy was familiar with Grothe's habits and manner of living; it was Daveluy who formulated and wrote out the answers." And when the application had been filled in, Grothe (an illiterate — barely able to sign his name), depending upon Daveluy, who told him that everything was all right, signed the application form. And the appellant continues: The acts of the agent are acts of the principal. If, in the application for insurance, there were any answers materially wrong, these answers were from Daveluy and were binding on the company, of which Daveluy was agent. But one of the answers was to the effect that Grothe had never been refused by an insurance company, while Daveluy knew that Grothe had been refused by two companies. The Court put the following questions to Daveluy: "Q.—Is it not a fact that through your intervention an application was made to the New York Life Insurance Company in June, 1903? A.—Yes. Q.—You had been informed that the application had been refused? A.—Yes. Q.—You had been advised of it by a notice? A.—I had knowledge of it from a special written notice. Q.—Now, when you received Grothe's application, did you know that it had already been refused by the New York Life Insurance Company? A.—Yes, certainly. Q.—Was that to your knowledge the only application by Grothe for insurance which had been refused? A.—No; there had been another refusal; that of the Sun Life." And, when it comes to a discussion of his temperate or intemperate habits, Daveluy answers that Grothe was temperate in his habits; he "occasionally" took a glass of whiskey. But the jury decided that these answers were materially wrong. I think that the proof establishes that Grothe drank more than a glass of whiskey "occasionally." In any event, it was a question

clearly within the limits of the powers of the jury. Daveluy—and I take the appellant's own argument—knew when Grothe answered in the way he did that he was misleading the company. As a matter of fact, is it possible to believe for one moment that if the company had been made aware that Grothe had been previously refused four times, it would have insured him? or, at least, would the class of risk not have been changed? In any event, the company would have been put on its guard. The respondent, therefore, was misled by Daveluy, on a subject which the jurors rightly declared to be of the essence of the risk, because from the expression, "materially correct," as used by the jury, I deduct that the answers affected the risk. It is the same as to his habits. The Judge gave a very wise direction: "Would it affect your appreciation of the risk if, instead of being told that a man only took a glass of whiskey occasionally, you were informed that he drank with five people if he met them, or with ten people if he met them—if you were told that he was in saloons frequently, drinking the greater part of his time, a hale fellow well met, though a man who, no doubt, had a great capacity to carry liquor (and people's capacities differ). I think you are in a position to say whether that would affect your appreciation of the risk." This direction was in conformity with the proof. But, according to appellant, Daveluy knew Grothe. He, therefore, misled the company again on a point which, I think with good reason, the jury decided affected the risk. It was with this proof in front of him that the Judge instructed the jury that Daveluy, in writing the answers he did, was not the agent of the company, but was Grothe's agent — adding these words: "It stands to common sense and to reason." The rule laid down by appellant, that the principal is responsible for the acts of his agent, is true, as a general thesis. But can that rule be made applicable to the present case, where a fraud was evidently practised upon the company respondent? The mandatory, in the performance of his mandate, must be in good faith. In a case of the Hastings Mutual Insurance Company v. Shannon, reported in volume 2 of the Supreme Court Reports, p. 394, the Chief Justice, Sir William Ritchie, says:—"The insurance was pressed on plaintiff by the agent of the company, authorized to obtain insurance for the company, and when so pressed to insure, the agent undertook to make out, with the assistance of an amanuensis selected by himself, the application: this he did as plain-

tiff's agent—if adopted by him.” I have reasoned out the case, always assuming that Daveluy was the agent of the company for the purpose of soliciting risks. But I would go further, and under the circumstances of the case, I would say that Grothe, in signing, without having it previously read to him, or at least explained to him, the application, has accepted as his own the incorrect written answers given by Daveluy. It must be remarked that the appellant does not say that Grothe was induced to sign the application through fraud or error, but that he signed simply on the assurance of Daveluy that everything was all right. In a case of *Biggar v. Rock Life Assurance Company*, decided in 1902 and reported in Vol. I., L. R., K. B., the agent of the company wrote the answers without the insured having read them. Mr. Justice Wright said: “I agree with the view taken by the Supreme Court (in the case of the *New York Life Insurance Company v. Fletcher*) that if a person in the position of the claimant chances to sign without reading it, a proposal from which somebody else filled in, and if he acquiesces in that being sent in as signed by him, without taking the trouble to read it, he must be treated as having accepted it. Business could not be carried on if that were not the law. For that purpose, it seems to me, if he is allowed by the proposer to invent the answers and to send them in as the answers of the proposer, that the agent is the agent, not of the insurance company, but of the proposer. I cannot put the doctrine better than in the language of the Supreme Court of the United States:—‘The application was signed without being read. It was held that the company was not bound by the policy; that the power of the agent would not be extended to an act done by him in fraud of the company and for the benefit of the insured, especially when it was in the power of the insured, by reasonable diligence, to defeat the fraudulent intent; that the signing of the application, without reading it or having it read, was inexcusable negligence, and that a party is bound to know what he signs.’” And Mr. Justice Field, of the Supreme Court of the United States, continues, speaking of the agent: “His conduct in this case was a gross violation of duty, in fraud of his principal and in the interest of the other party. When an agent is apparently acting for his principal, but is really acting for himself or third persons and against his principal, there is no agency in respect of that transaction. The fraud could not be perpetrated by

the agent alone. The aid of the insured, either as an accomplice or as an instrument, was essential." And Mr. Justice Wright continues: "That doctrine of the Supreme Court of the United States seems to me to be good sense and good law." While studying the above case, I found a striking analogy to the present case. Therefore, the Judge was right when he instructed the jury that Daveluy was Grothe's agent. But if Daveluy was not Grothe's agent, the latter would have remained in complete ignorance of the contents of the contract, and there would have been no contract, since, according to appellant, there would have been no consent on the part of the insured. So that from whatever point one may view the case, we cannot see how the appellant can succeed. There remains the question of costs. I think that the Judge below wisely exercised his discretion, and that there is no reason for us to interfere; the appellant, if he had asked it, could have had all proceedings suspended in one of the cases. I must add, in closing, that I have discovered nothing in this case which would lead me to believe that the appellant in any way took any part in the false representations which misled the company respondent in issuing the policy. The verdict of the jury, in any event, clearly states so. We are unanimous in dismissing the present appeal with costs.

QUEBEC.

COURT OF KING'S BENCH.

FEBRUARY 25TH, 1907.

THE MONTREAL LIGHT, HEAT, AND POWER COMPANY v. LAWRENCE.

Negligence—Electric Lighting—Excessive Current.

BLANCHET, J.:—The present appeal is taken from a judgment rendered by Mr. Justice Doherty in the month of May last, granting the plaintiff's motion for judgment in accordance with the verdict of the special jury which had tried the case, and which had found that the death of the respondent's husband was caused by the fault of the company defendant, and had assessed the damages in her favour at seven thousand dollars.

The plaintiff's declaration contained the usual formal allegations, and alleged that the electrical installation in the premises of the deceased was supplied with current by the company appellant; that on the 11th day of November, 1905, the deceased, as was his custom, went to light a portable lamp in the yard at the rear of his premises, put his hand on the insulated wire and received an electric shock so violent that he was killed instantly; that this accident was due to the fault of the company defendant, who was bound to insure the transmission of the regular potential force of current; that the wire, which the late J. J. Paquette touched, was in a normal and safe condition, and would have offered no danger if the electric apparatus of the company had not been in bad order; that particularly one of the two transformers which reduced the electric current for Paquette's residence and others was defective; that the company defendant had neglected to make regular inspection of its installation. By its plea the company defendant set up that the lamp in question was placed there without the knowledge or consent of the company, and in the defiance of express prohibition contained in the contract; that the contract was for the supply of current to the private residence only; that by the contract the consumer agreed to maintain all lines in the premises in efficient condition with proper protective devices, the whole according to the fire underwriters' requirements; that no new connection should be made without the consent of the company; that in the event of defective service notice of the fact should be sent to the company's office immediately; and, finally, that in and by the contract it was agreed that the company in the supplying of current should make use of only recognized standard transformers and other appliances, and should incur no liability for damages to person or property caused in any manner whatsoever by high tension current whether through failure or not of the appliances or otherwise. The company appellant then alleged that they had accepted the application only upon these conditions, and after making a careful inspection of the premises; that subsequently, in violation of the express terms of the contract, Paquette had caused additional connections to be made, by which he had conveyed the current outside the premises; that in making the said illegal connection, he had not provided or maintained lines in efficient condition and with proper protective devices. The plea then goes on to set forth the various respects in which the

additional installation was defective and dangerous. It was further alleged that the deceased was well aware at the time of the accident that the wiring was in an abnormal and dangerous condition, but that instead of notifying the company, as he was required to do by his contract, he had rashly and imprudently taken hold of the wire and brought about his own death. Finally, that by the clause of the contract cited above, the deceased had released the company from all liability, and that this agreement constituted complete indemnity and satisfaction.

The answer to plea was in effect that the contract had been signed by Paquette by error and surprise. The case went to trial before a special jury, presided over by Mr. Justice Doherty, who withdrew the questions which had been fixed, and submitted an entirely new set of questions to the jury.

By consent of both sides, the usual addresses of the counsels were dispensed with, the case being submitted upon the Judge's charge alone.

The jury unanimously gave a verdict in favour of plaintiff for \$7,000, and Mr. Justice Doherty, the presiding Judge, rendered judgment, confirming the verdict, with costs.

The questions put to, and the answers given by, the jury, as fixed by the Judge, were as follows:

1. Was the plaintiff, Dame M. L. Laurence, the wife; and was the plaintiff, Jean Paquette, the father of the late Joseph Jean Paquette? Yes.

2. Was the said late Joseph Jean Paquette, on the 11th of November, 1905, killed by an electric shock received by him in a shed or yard in rear of his store, number 1584 St. Lawrence street, in the town of St. Louis, and adjoining his residence, number 1580 of said street? Yes.

3. Did the said Paquette (deceased) sign the contract exhibit D1; if so, did he sign it by error or surprise? Yes, he signed but without full knowledge of its contents.

4. Did the defendant connect its system with the premises of the deceased in consideration and by virtue of said contract? Yes.

5. Did the deceased after contract signed and connection made and without the knowledge or consent of defendant, cause new and additional connections to be made and used by which the current was conveyed outside to the rear of

the premises and to the stables beyond? Yes, we believe, without knowledge on his part of violation of contract.

6. Did the said accident occur by contact with wires or a lamp forming part of or attached to such additional connections? Yes, by contact with wires.

6a. Were the said additional connections installed with "proper protective devices according to the Fire Underwriters' Requirements?" No, he (Paquette, the deceased) depended entirely on the knowledge of the electrician.

7. Did the defendant in the supply of electric current to the premises of the deceased, make use of only recognized standard transformers, meters, wires and other appliances? Yes, but neglected to use only apparent safeguard, grounding of wire.

8. Was the death of the said Joseph Jean Paquette caused by the fault of the company defendant; if so, in what did the fault consist? Yes, by defective transformer, consequently largely increased voltage.

9. Was the death of the said Paquette caused by his own fault? If so, in what did said fault consist? No.

10. Was the death of the said Paquette caused by the combination of fault on the part of the company, and on the part of the said Paquette. If so, in what did the said fault consist? Caused by the company only.

11. Did the death of the said Paquette cause damage to plaintiff. If so, in what amount to each of them? We consider Jean Paquette has no claim. We consider Dame M. L. Laurence is entitled to \$7,000 damages.

12. If you have answered question 10 affirmatively, to what amount do you reduce the amount of damages found as regards each plaintiff, by your answer to question 11? No answer, as question 10 answered negatively.

The judgment was that the said answers constitute a verdict for \$7,000 for the plaintiff, Dame M. L. Laurence, and a verdict for defendant on the issue with plaintiff Paquette, and rejected defendant's plea to the demand of plaintiff, and condemned defendant to pay plaintiff Dame M. L. Laurence the sum of \$7,000, with interest thereon from date of service of action, and costs of action and of trial herein; and dismissed the action and demand of plaintiff Paquette, with costs of said action against him up to the rendering of the judgment of the 1st May, 1906, joining said action with that of the other plaintiff.

The reasons for the present appeal are:

1. Because the learned Judge presiding at the trial misdirected the jury as set forth in the exception filed by the appellant to his charge.

2. Because the jury by their answer to question 3 found that the deceased signed the contract, exhibit D-1, but added to their answer the words "but without full knowledge of its contents."

3. Because the jury were led to answer the said question as above owing to the misdirection of the learned Judge as set forth in said exception, and in any event said answer would not be sufficient to constitute error or surprise or to relieve the deceased from his obligations under the said contract.

4. Because although the jury in their answer to question 4 found that the company appellants connected its system with the premises of the deceased only in consideration of and by virtue of said contract, nevertheless they found the appellant responsible for the accident in question, notwithstanding the fact that it resulted from a direct violation of the said contract on behalf of the deceased.

5. Because the jury, in answer to question 5, found that the deceased, after the said contract had been signed and connections made and without the knowledge or consent of the appellant, caused new and additional connections to be made and used by which the current was conveyed outside to the rear of the premises and to the stable beyond, but added to the response the words: "we believe without knowledge on his part of a violation of the contract."

6. Because the jury were led to make this addition to their response and to treat it as relieving the deceased from fault by reason of the misdirection of the learned Judge as complained of in the exception filed.

7. Because, although the jury in answer to question 6, found that the said accident occurred by contact with a wire forming part of such additional connections, nevertheless found that the death of the appellant's husband was caused by the fault of the appellant only, notwithstanding the fact that the said additional connections were made in an improper manner, without the knowledge or consent of the appellant, and in violation of the terms of the contract.

8. Because, the jury in answer to question 6a, found that the said additional connections were not installed with proper protective devices according to the Fire Underwriters' re-

quirements, but added to their answer the words: "He, the deceased, depended entirely upon the knowledge of the electrician."

9. Because the jury made the said addition to their answer and treated it as relieving the deceased from fault by reason of the misdirection of the learned Judge's charge complained of in the exception filed; since it was proved without contradiction that the electrician was employed by the deceased, who would consequently be responsible for his acts, as much as if he had done the wiring himself.

10. Because the jury in answer to question 7, found that the defendant, in the supply of electric current to the premises of the deceased, made use of only recognized standard transformers, meters and other appliances, but neglected to use only apparent safeguard grounding of wire.

11. Because the jury made the said addition to their answer, by reason of the misdirection in the learned Judge's charge, complained of in the exception, by the appellant.

12. Because the jury, in answer to question 8, found that the only fault which caused the accident was the defective transformer, without finding that the company appellants were responsible in any way for its defects.

13. Because as a matter of fact there was no evidence whatever that the transformer was defective.

14. Because the verdict is contrary to law and clearly against the weight of the evidence.

15. Because in virtue of the contract, exhibit D-1, the company were relieved from all responsibility for damage, in consideration of which only they consented to connect their system with that of the respondent.

16. Because the evidence clearly showed, and the verdict of the jury in fact establishes, that the death of the deceased was caused by his own acts, in violation of his contract.

17. Because the facts found by the jury required a judgment in favour of the company appellants.

18. Because the amount awarded is excessive.

19. Because it is absolutely clear, from all the evidence, that no jury would be justified in finding any verdict other than one in favour of the appellant.

The majority of this Court is of opinion that the appellant has not established that it has suffered any substantial prejudice from what it claims to be a misdirection of the Judge who presided at the trial. Consequently, we can give it no relief on that point. The evidence of record estab-

lished conclusively the fault and negligence of the appellant. The damages awarded, considering the needs of the respondent, are not excessive. The majority of this Court confirms the judgment and dismisses the appeal with costs.

TRENHOLME, J., dissenting:—I have only a few words to say in connection with this case, in explanation of the fact that I do not agree with the decision of the majority of the Court. The unfortunate man, whose death is in question in this case, was killed by an electric shock in his own building, and through some electric wiring that he had himself introduced into the building in violation of his contract with the company appellants. It was stipulated in the written contract between himself and the company that he was not to introduce or install any new wiring without the consent and co-operation of the company. In contravention of this contract, he installed this new wiring without their knowledge or consent, and the result was that he was killed by that very wiring that he had himself installed. I think that there was undoubtedly contributory negligence on the part of the deceased, and that the amount of the verdict of the jury ought to be reduced or a new trial ordered.

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